No. 00-____ (1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

MELVIN I. UROFSKY, PAUL SMITH, BRIAN J. DELANEY, DANA HELLER, BERNARD H. LEVIN, and TERRY L. MEYERS,

Petitioners,

—v.—

JAMES S. GILMORE, III,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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151 pp

QUESTIONS PRESENTED

(1) Whether state-employed scholars have a First Amendment-based right of academic freedom in connection with their job-related research and writing.

(2) Whether job-related research and writing by public employees, including but not limited to professors, can ever be on matters of public concern.

(3) Whether a content-based licensing-scheme that bars state-employed scholars from conducting job-related research and writing on "sexually explicit" subjects without obtaining prior written permission violates the First Amendment.

(4) Whether, under the heightened scrutiny applicable to content-based restrictions on academic freedom, or under the *NTEU/Pickering* balancing test, Virginia failed to justify its prohibition of professors' and other public employees' job-related research and writing on "sexually explicit" subjects.

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ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF *CERTIORARI*

Petitioners respectfully petition this Court for a writ of *certiorari* to review the June 23, 2000 judgment of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, which found no First Amendment protection, under any circumstances, for state-employed scholars or other public employees in connection with their work-related research and writing.

OPINIONS BELOW

The *en banc* opinion of the court of appeals upholding Virginia Code §2.1-804-806 is reported at 216 F.3d 401 and is reprinted in the appendix at 1a. The panel decision is reported at 167 F.3d 191 and reprinted in the appendix at 79a. The decision of the district court striking down the statute, *Urofsky v. Allen*, 995 F.Supp. 634 (E.D.Va. 1998), is reprinted in the appendix at 90a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment makes the guarantees of the First Amendment applicable to the states.

Virginia Code §2.1-804-806 ("the Act") bars all state employees, including university professors (but excepting employees of the Department of State Police), from using their state-supplied computers to "access, download, print or store any information infrastructure files or services having sexually explicit content," unless they receive prior written approval from their agency heads. Such approval is to be "available to the public under the provisions of the Virginia Freedom of Information Act." The Act is reprinted in the appendix at 112a.

In defining "sexually explicit content," the Act makes reference to Virginia Code §18.2-390. the pertinent provisions of which are reprinted in the appendix at 114a.

STATEMENT OF THE CASE

In June 1996, the Virginia legislature passed Code §2.1-804-806, which bars approximately 101,000 state employees -- including faculty members, librarians, and other researchers employed at 39 state institutions of higher education -- from using their state-supplied computers to write, conduct research, or communicate via the Internet if the content of the research or writing is "sexually explicit." The Act defined "sexually explicit" to mean, *inter alia*, any depiction or description of "sexual excitement," "sexual conduct," or "a lewd exhibition of nudity."

The Act clearly covers a broad range of nonobscene expression; it contains no requirement that the communication lack serious value, be "patently offensive," or appeal to prurient interests. Professors and others seeking to write, conduct research, or communicate "sexually explicit content" may seek a license ("prior written approval from their agency heads") which then becomes a public record. No standards or procedures are specified to govern the licensing scheme.[1]

Petitioners, six professors at Virginia state universities or colleges, filed suit in May 1997, alleging that the Act, both facially and as applied, violates the First Amendment-based academic freedom rights of university scholars as well as the First Amendment rights of other public employees engaged in legitimate, work-related intellectual inquiry.[2]

Melvin Urofsky, a history professor and nationally recognized expert on communications and constitutional law,

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[1] The Act restricts only employees; computers are available for research purposes to students and members of the public at state university libraries and other state libraries without content restrictions.

[2] They also challenged the Act on grounds of vagueness and overbreadth.

alleged that he had been unable to assign students online research assignments regarding federal indecency law because of the Act. Terry Meyers, an English professor and expert on the "fleshly school" of Victorian poetry, said the Act prohibited him from researching sexually explicit themes in the work of Algernon Charles Swinburne and other poets, including material supplied by the Commonwealth for the use of its scholars on its own Virtual Library of Virginia ("VIVA") database. Bernard Levin, a psychology professor, feared that the Act banned online research and communications on sexually explicit subjects in the psychological literature, including "aspects of adult or adolescent sexuality; Freud's libido concept; Freud's oral, anal, and genital stages of development; or Freud's concept of penis envy." Paul Smith, an internationally recognized scholar in the fields of literary theory and cultural studies (including the ways in which contemporary pornography shapes gender roles and sexual identity), was ordered by administrators at George Mason University to delete some images from his Web site (over which the university specifically disclaimed editorial control) because of the Act. Dana Heller, who teaches American literature, gender studies, and gay/lesbian studies, alleged that the Act inhibited her scholarly research and online exchanges with colleagues, and that the licensing requirement was particularly problematic because lesbian and gay studies "is a controversial subject area for some people." Finally, literature professor Brian Delaney pointed to sexually explicit online content that informs his scholarship and teaching. All six plaintiffs said that the licensing scheme -- the functional equivalent of requiring prior approval to read books with "sexually explicit content" in the university library -- inhibited scholarly work and violated widely accepted norms of academic freedom. Statement of Undisputed Facts, ¶¶32-98, Joint Appendix to Court of Appeals, at 238-66 (hereafter "J.A.").

After discovery, the parties filed cross-motions for sum-

mary judgment. Petitioners' motion was supported by an extensive Statement of Undisputed Facts in addition to exhibits and declarations detailing the wide range of scholarly uses of sexually explicit content in the arts, literature, psychology, and other fields. The record indicated that a handful of license requests had been received since the passage of the Act, although administrators of two departments at the University of Virginia (Health Sciences and Information Technology) had issued blanket licenses because they "wouldn't do anything but approve exceptions if they were on a case-by-case basis." One professor at the College of William & Mary received approval in connection with a scholarly journal, *Eighteenth Century Life*, but other members of the staff and editorial board of the journal did not. The record further showed that state universities had a variety of different "acceptable use" policies, responsive to the particular characteristics of the academic environment, that governed faculty, staff, and student computer access. J.A. 286-94, 283-84, 299-349, 387-88.

Finally, the record showed that for nonacademic employees, state personnel policies were in place to control unauthorized computer use. In general, these policies required that the use be work-related. J.A. 357-67. A few instances of recreational computer use by state employees to access pornography, to which the Commonwealth pointed as justification for the Act,[3] had been dealt with under these existing content-neutral policies.

On February 26, 1998, the federal district court granted plaintiffs' motion for summary judgment and denied the state's motion. The court found that the Act imposed "a

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[3] The Commonwealth had submitted five brief affidavits adverting to incidents in which employees used computers to download sexual images unrelated to their work; at least two and possibly three of these incidents occurred after the Act's passage. J.A. 202-11.

prospective deterrent 'to a broad category of expression by a massive number of potential speakers,'" including "inquiry and debate by academics in the fields of art, literature, medicine, psychology, anthropology, and law . . . ." Pet. App. 95a, 98a, quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 467 (1995)("*NTEU*"). Applying the constitutional balancing test that this Court prescribed in *NTEU* for such broad prior restraints on public employee speech, and noting that strict scrutiny is usually required where a speech restriction discriminates on the basis of content, the court concluded that Virginia had not justified the Act, particularly given that existing content-neutral policies adequately addressed the state's asserted concerns about workplace efficiency and prevention of "a sexually hostile work environment."[4]

The district court noted that to the extent the Act addressed workplace efficiency or sexual harassment, it was not narrowly tailored. It targeted large quantities of valuable, work-related online expression that would not interfere with workplace efficiency or cause harassment; while it ignored both off-line sexual content that might be perceived as harassing, and numerous nonsexual Internet temptations that might undermine efficiency. This "'obvious lack of "fit" between the government's purported interest and the sweep of its restrictions,'" the court said, "casts 'serious doubt' on the government's asserted need for the statute." Pet.App. 101a, quoting *Sanjour v. Environmental Protection Agency*, 56 F.3d 85, 95 (D.C.Cir. 1995).

As for the licensing scheme, the court found that the unbridled discretion it reposed in administrators, its "absence of clear criteria," and its public-disclosure mandate combined "to invite arbitrary enforcement and to chill the free

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[4] These concerns were not articulated by the legislature at the time of passage, but by the Commonwealth's attorneys during the litigation.

exercise of speech rights." The public records provision in particular was "a not-so-veiled threat to the agency head who approves such speech." Pet.App. 106a.

On appeal by the Commonwealth, a three-judge panel (Wilkins, J.) reversed the district court and upheld the Act without engaging in any level of constitutional scrutiny. Instead, two of the three judges ruled that no public employees, including professors, had any First Amendment protection in connection with their work-related research, writing, or other communications. The third, Judge Hamilton, concurred because he believed that *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.), *cert. denied*, __ U.S. __, 119 S.Ct. 47 (1998), a case involving curriculum choice by a high school teacher, dictated the result that the majority reached. Pet.App. 83a-88a, 88a-89a. Judge Hamilton had dissented in *Boring*.[5]

Petitioners obtained rehearing *en banc* but, in a split decision, a narrow majority of the Fourth Circuit again reversed the district court. Writing now for six of twelve judges, Judge Wilkins reiterated the panel majority's position that state employees, including university teachers and scholars, have no First Amendment rights at all in connection with their work. He interpreted this Court's public employee free-speech precedents -- *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); and *NTEU* -- as establishing a rigid line between state employees' speech "in their capacity as citizens upon matters of public concern" and their speech in relation to their professional responsibilities. The latter, he asserted, can be controlled by the state without any constitutional lim-

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[5] After the panel decision, the legislature narrowed the Act's definition of "sexually explicit content" to expression "having as a dominant theme" any "lascivious"" description or depiction of sexual conduct or sexual excitement. Virginia Code §2.1-804.

itation because, "in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties . . . ." Pet.App. 13a. Thus, the six-judge majority ruled that even academic employees have no First Amendment protection for their work-related intellectual pursuits.

The majority distinguished *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) -- which recognized academic freedom as a "special concern" of the First Amendment -- on the ground that these cases did not actually "set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom." Moreover, the majority said, "to the extent it has constitutionalized a right of academic freedom at all," this Court "appears to have recognized only an institutional right of self-governance in academic affairs." Pet.App. 19a.[6]

Judge Hamilton again concurred in the judgment while disputing its analysis. He continued to believe that the circuit's prior decision in *Boring*, although wrong, dictated the result. "Left to my own devices," he said, "I would hold that the Appellees' speech in this case is entitled to some measure of First Amendment protection . . . ." Pet.App. 47a.

Chief Judge Wilkinson filed a separate opinion disputing the majority's view that public employees lack all First Amendment protection in connection with their work. The majority went astray, he said, "by placing exclusive em-

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[6] Alternatively, the six-judge opinion asserted that, even if some Supreme Court decisions "could be said to have established a constitutional right of academic freedom," such holdings "would be of little significance" given a "historical context" in which the Court had not yet rejected the "right-privilege distinction" for purposes of public employment. Pet.App. 22a.

phasis on the fact that the statute covers speech of 'state employees in their capacity as employees.'" One's status when undertaking research or communicating "is certainly relevant to the analysis," he said, but it is not determinative. The majority failed to examine both the content and context of the expression restricted by the Act, which included university scholarship that obviously addressed matters of public concern. Chief Judge Wilkinson added that the "right to academic inquiry" into subjects as diverse as medicine, psychology, art history, and literature "cannot be divorced from access to one means (the Internet) by which that inquiry is carried out." Pet.App. 49a, 52a.

Chief Judge Wilkinson concurred in the judgment, however, because he believed that despite the high burden established by *NTEU*, the state had proven that "the interests of plaintiffs and of society" in the expression restricted by the Act "'are outweighed by [the] expression's necessary impact on the actual operation of the Government.'" Pet.App. 58a, quoting *NTEU*, 513 U.S. at 468. He concluded that the prior permission requirement was only "a minimal intrusion on academic inquiry." Pet.App. 60a.[7]

Four judges dissented. In an opinion by Judge Murnaghan (joined by Motz, Michael, and King, JJ.), the dissenters said that the majority had adopted "an unduly restrictive interpretation of the 'public concern' doctrine," Pet.App. 66a -- one that was belied by *Connick* itself, which involved speech of both public and private concern, even though it was contained in the same questionnaire. They concluded that the Act's restriction on research, writing, and discussion by "university professors, librarians, museum workers, and physicians and social workers," among others, "undeniably touch on matters of public concern" and therefore merit con-

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[7] Judge Luttig also concurred separately, to contest Chief Judge Wilkinson's views on academic freedom. Pet.App. 27a.

stitutional protection. Pet.App. 72a. The recent narrowing of the Act "does not change the analysis," since "[m]any works of public import could be classified as lascivious," including "the works of Toni Morrison and many themes found in Victorian poetry," e-mail discussions by psychologists, and publications regarding abnormal sexual behavior. Pet.App. 73a.

Reaching the *NTEU* balancing test, the dissent found that the Act was not narrowly tailored to serve Virginia's asserted interests. It addressed neither nonsexual nor noncomputer-related causes of workplace inefficiency; and it ignored "books, calendars, pictures," and other off-line material that might create a sexually hostile environment. "A professor therefore would violate the Act by accessing the Internet to complete research on Victorian poetry, yet he would not violate the Act by leaving copies of Hustler Magazine lying around his office." Pet.App. 76a. Equally important, the Act was overinclusive because it reached a vast amount of legitimate, nonharassing research and communication. It was not saved by the licensing scheme because "the 'mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . . .'" Pet.App. 78a, quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

Petitioners sought a stay pending their filing of this petition, which a majority of the Fourth Circuit denied on July 26, 2000, over five dissents.

REASONS FOR GRANTING THE WRIT

In denying any First Amendment protection, regardless of circumstance, for the work-related research and writing of university scholars, the Fourth Circuit majority deviated from this Court's many statements recognizing academic

freedom as an essential component of the First Amendment. The majority similarly erred when it ruled that no state employees can ever possess First Amendment rights in connection with their job-related expression. The two rulings together represent an unprecedented assault on the free speech rights of public employees, contravene decisions of this Court, and conflict with the law in other circuits.

ARGUMENT

I. THE COURT OF APPEALS' RULING THAT STATE-EMPLOYED PROFESSORS HAVE NO FIRST AMENDMENT-BASED RIGHT OF ACADEMIC FREEDOM CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS ON AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW

At the core of academic freedom is uninhibited intellectual inquiry and exchange -- "the atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education." *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978)(Powell, J.), quoting *Sweezy v. New Hampshire*, 354 U.S. at 263 (Frankfurter, J., concurring). This uninhibited inquiry and exchange is carried on by *individuals*. It thus cuts the very essence out of academic freedom to rule that it provides no protection to individual scholar-professors but only to the academy as an institution. The "thought and experiment that is at the center of our intellectual and philosophic tradition," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995), becomes an empty platitude if the First Amendment is read to permit the state to silence the very scholars who

engage in that thought and experiment.[8]

This Court made the centrality of individual scholarship clear in *Keyishian* when it noted that "academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned." 385 U.S. at 603. *Sweezy* made the same point: "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." 354 U.S. at 250. *See also Whitehill v. Elkins*, 389 U.S. 54, 60 (1967)(same); *Wieman v. Updegraff*, 344 U.S. 183, 195-96 (1952)(Frankfurter, J., concurring)(teachers are "the priests of our democracy," whose work "brings the safeguards of [the First and Fourteenth] amendments vividly into operation").[9] These early cases thus recognized individual scholarship as the core of academic freedom, from which claims of institutional autonomy derive. Indeed, because universities function through the ideas and writings of faculty members, individual and institutional autonomy are often closely entwined; and both are threatened by political interference of the type found in this case. *See Sweezy* (political investigation by state attorney

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[8] There is no issue in this case of academic freedom rights at the elementary or secondary school level, where teachers generally do not engage in independent research and writing. Nor is there any issue regarding control over curriculum content.

[9] *See also University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990)(academic freedom protects against government attempts "to control or direct the *content* of the speech engaged in by the university or *those affiliated with it*")(second emphasis added); *Board of Educ. v. Pico*, 457 U.S. 853, 915 (1982)(Rehnquist, J., dissenting)(importance of "freewheeling inquiry" at university libraries); *Board of Regents v. Southworth*, 529 U.S. __, __, 120 S.Ct. 1346, 1359 (2000)(Souter, J., concurring)(academic freedom bars legislatures "from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching").

general); *Keyishian* (legislative imposition of loyalty oaths and political restrictions on professorial work).

In *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), the Court did note that the individual and institutional components of academic freedom can sometimes conflict. But it certainly never suggested that academic freedom applies only to institutional decisionmaking. Indeed, *Ewing*'s reference to the "independent and uninhibited exchange of ideas among teachers and students," *id.* at 226 n.12, reiterated the centrality of intellectual work by individuals. *See also Piarowski v. Illinois Comm. College*, 759 F.2d 625, 629 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985). The Fourth Circuit majority simply ignored *Ewing*, and twisted the line of cases that preceded it, when it read personal scholarship out of the First Amendment.

The majority argued in the alternative that any individual right of academic freedom would involve only a professor's speech "as a private citizen" (referring to New Hampshire's investigation of Paul Sweezy). This attempt to distinguish between state-employed scholars' intellectual work as "citizens and as "employees" not only misreads *Sweezy*, which involved work-related speech (classroom lectures), but it ignores the combined citizen-scholar role that university professors are employed to play in society. Just as the loyalty scheme struck down in *Keyishian* interfered with professors' work-related academic writings and classroom teaching as well as their more general political associations, *see* 385 U.S. at 600-02, and the similar scheme in *Baggett v. Bullitt*, 377 U.S. 360, 369-72 (1964), chilled the editing of scholarly journals and attendance at academic conferences, so in the present case, the research and writing of university scholars is the quintessential example of job-related speech that merits substantial First Amendment protection. Even if the "citizen"/"employee" distinction has relevance in this context, therefore, professional academic

work cannot be neatly split into "citizen" and "employee" categories.

The majority's simplistic reduction of all public employees to "government speakers" any time they are doing intellectual work in connection with their jobs ignores the rich variety of professional roles performed by public servants, especially academics, and undermines the fundamental premise of First Amendment academic freedom. As Chief Judge Wilkinson pointed out, in their research and writing, professors are far from "state mouthpieces." Pet.App. 53a. On the contrary, as this Court has repeatedly recognized, the very premise of academic freedom is the uninhibited exchange of *differing* ideas. The university "is a traditional sphere of free expression so fundamental to the functioning of our society that the government's ability to control speech within that sphere" is undoubtedly limited by the First Amendment. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991), citing *Keyishian*, 385 U.S. at 603, 605-06.

Like virtually all constitutional rights, the academic freedom component of the First Amendment is not an absolute. Individual faculty freedom (like institutional autonomy) may sometimes be outweighed by legitimate needs of the state. The court of appeals never addressed any possible balancing of interests, however, because it denied any First Amendment protection whatsoever for state-employed scholars' professional work.

The Fourth Circuit's ruling on academic freedom conflicts with the law in at least five other courts of appeal. *See Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1188-89 (6th Cir. 1995)(recognizing individual academic freedom in the course of adjudicating a university athletic coach's

challenge to a campus harassment code);[10] *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997)(individual academic freedom violated when an administrator ordered professors to remove materials concerning military history from a display case); *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971-72 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 1290 (1997)(individual academic freedom principles infringed by a college's vague sexual harassment policy, which had been applied to punish a professor's classroom expression); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 597-98 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991)(applying individual academic freedom to the classroom context);[11] *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1274 (7th Cir. 1982)(declaring, in connection with a subpoena for academic research material, that individual scholarly research "lies at the heart of higher education" and thus "comes within the First Amendment's protection of academic freedom"). Notably, all of these cases except *Dow* involved individual academic freedom interests that were more ambiguous, or fraught with countervailing state or university claims, than the pure research and writing involved in the present case.[12]

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[10] The court found that academic freedom was not violated by punishment of the coach for using a racial epithet during a motivational talk to his players -- not a matter of public concern -- but struck down the harassment code as vague and overbroad. *See also Parate v. Isibor*, 868 F.2d 821, 827-28 (6th Cir. 1989)(courts have "afforded substantial protection to the First Amendment freedoms of individual university professors" in connection with their work).

[11] *See also Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994)(professor's expression in classes and campus publications).

[12] The Fourth Circuit cited *Edwards v. California Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999), as a court of appeals decision denying an individual right of academic freedom, but the

(continued...)

In short, *certiorari* should be granted because the Fourth Circuit ruling undermines bedrock First Amendment principles and conflicts with academic freedom precedents in both this Court and the courts of appeals.

II. THE COURT OF APPEALS' RULING THAT JOB-RELATED RESEARCH AND WRITING BY PUBLIC EMPLOYEES CAN NEVER BE ON MATTERS OF PUBLIC CONCERN CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS ON AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW

The Fourth Circuit's ruling was premised on a rigid, artificial misconstruction of this Court's public employee free speech cases. As the dissenters explained, *Pickering v. Board of Educ.* and *Connick v. Myers* do not create the calcified First Amendment regime envisioned by the majority, in which all job-related inquiry and expression, no matter what the context, has no constitutional protection whatsoever. In *Connick* itself, the plaintiff was discharged for circulating a questionnaire that contained several questions relating to private employee grievances, and one involving a matter of public concern. Yet, as the dissent below noted, this last question was still "*speech by an employee in her role as an employee* . . . . The majority's formalistic focus on the 'role of the speaker' in employee speech cases therefore runs directly contrary to Supreme Court precedent." Pet.App. 67a.

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[12] (...continued)
case only concerned a professor's choice of curriculum, not scholarly research, writing, or exchange with colleagues; and the court specifically cited *Ewing*'s recognition of both individual and institutional components of academic freedom. 156 F.3d at 492.

Indeed, as this Court said in *Waters v. Churchill*, 511 U.S. 661, 674 (1994), "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." This does not mean that employees' First Amendment interests will prevail in every case, as *Waters* itself makes clear; only that the government cannot avoid its burden of justification simply by arguing that the employee's speech was in connection with her job.[13]

The majority's rigid "citizen"/"employee" distinction wrenches these terms out of the context in which they were articulated in *Pickering* and *Connick* (speech "as a citizen *upon matters of public concern*" versus speech "as an employee *upon matters only of personal interest*," *Connick*, 461 U.S. at 147 (emphases added)). None of this Court's cases suggests that speech "as an employee" can never address matters of public concern or, conversely, that public employees can never speak as "citizens" while performing their jobs. As the Court of Appeals for the Seventh Circuit explained in *Bonds v. Milwaukee County*, 207 F.3d 969, 980 (7th Cir. 2000),

> When courts refer to "speech as a citizen," it is shorthand for the constitutionally protected expression of personally-held views regarding a public concern. The underlying substantive

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[13] The public concern doctrine of *Pickering* and *Connick* is consistent with this Court's individual academic freedom cases. As the Sixth Circuit explained in *Dambrot*, "[t]he analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." 55 F.3d at 1188. *See also* Chief Judge Wilkinson's concurrence, Pet.App. 52a (state-employed scholars are the quintessential example of employees who are "hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern").

> question is whether the particular speech at issue constitutes the employee's own personal expression, intended as public comment, on a matter of public interest, rather than mere articulation of the employer's position or speech directed by a private grievance . . . . Indeed, we commonly have found speech by public employees spoken pursuant to their employment duties to constitute speech on a public concern.

See also Wilson v. UT Health Center, 973 F.2d 1263, 1269 (5th Cir. 1992)(plaintiff spoke as both citizen and employee; denying First Amendment protection simply because speech is job-related "would permit public employers to remove constitutional protection from speech on certain subjects by including those subjects within employees' reporting duties").

The communications, research, and writing of university professors are probably the quintessential example of expression that combines employee and citizen roles, precisely because it is an intrinsic part of their jobs, and it frequently addresses matters of public concern. Much the same can be said about judges when they write concurring or dissenting opinions, legislators when they dispute with one another, librarians when they assist members of the public with research projects, psychologists when they debate social service policy, and public health researchers when they disagree over AIDS prevention priorities. All speak as employees as well as citizens, on matters of public concern.

At the core of the public concern inquiry are questions of "content, form, and context." *Connick*, 461 U.S. at 147. Thus, status and job-relatedness are often factors, but hardly conclusive ones. Nor does the fact that, in some contexts, state employees deliver prescribed government messages (and therefore have no First Amendment right to deviate

from the official line) mean that every job-related utterance, writing, or research project in every circumstance is totally controlled by the state. Fundamentally, the content of the expression and its importance to the public are what counts. *See, e.g., Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988)(rejecting defendant's argument for a *per se* rule that "communications made in the course of an employee's official duties" lack First Amendment protection).

No other circuit court has interpreted the *Connick /NTEU* line of cases to preclude any First Amendment protection in any circumstance where a public employee's expression is job-related. To the contrary, the Sixth Circuit in *Dambrot*, 55 F.3d 1177; the Second Circuit in *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998); the D.C. Circuit in *Sanjour*; the Seventh Circuit in *Bonds*, 207 F.3d at 979-81; the Ninth Circuit in *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1998), and the Tenth Circuit in *Koch* have all said that expression, even in the course of employment, merits First Amendment protection if it is on a matter of public concern.[14] *See also Chateaubriand v. Gaspard*, 97 F.3d 1218, 1222-23 (9th Cir. 1996); *Latino Officers Ass'n v. City of New York*, 196 F.3d 458, 468 (2d Cir. 1999).[15]

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[14] *Nunez* involved a court administrator's refusal to limit attendees at training seminars to those employees who had worked in a judge's re-election campaign, an act of protest that the court deemed to be expressive conduct on a matter of public concern. It was clearly within the scope of employment. *Harman* involved social workers' responses to job-related questions from the media; *Sanjour*, work-related but unofficial speaking engagements; *Bonds*, criticism of a former employer; and *Koch*, an internal report that the court ultimately decided was not of public concern.

[15] The *en banc* ruling is also in conflict with prior Fourth Circuit decisions, *e.g., McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998); *Piver v.* (continued...)

The majority's reliance on a Fifth Circuit decision, *Terrell v. University of Texas Sys. Police*, 792 F.2d 1360 (1986), *cert. denied*, 479 U.S. 1064 (1987), is not on point because in *Terrell*, the employee's speech was truly private (entries in a personal diary). To the extent that *dicta* in *Terrell* rejected "the inherent interest or importance of the matters discussed by the employee" as an element in the public concern analysis where the employee's speech is job-related, *id.* at 1362, it does not represent the law of the Fifth Circuit. The more recent decision in *Wilson v. UT Health Center*, 973 F.2d at 1269-70, rejects this position, as does *Harris v. Victoria Indep. School Dist.*, 168 F.3d 216, 222 (5th Cir.), *cert. denied*, __ U.S. __, 120 S.Ct. 533 (1999)(rejecting argument that "when a public employee speaks in his role as an employee, his speech may only be considered on a matter of public concern if it involves the report of corruption or wrongdoing to higher authorities").

The Eighth Circuit actually comes closest to the Fourth Circuit's position. In *Buazard v. Meridith*, 172 F.3d 546, 548 (8th Cir. 1999), the court stated that "[w]hen a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern." But the court went on to consider context (whether the speech in question was "entirely internal" to the police department), thus indicating that the plaintiff's "role as employee" was not wholly determinative. *Id.* at 549.[16] Still, the Eighth Circuit's position

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[15] (...continued)
Pender County Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988); *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

[16] *See also Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1199 (8th Cir. 1993), presaging *Buazard* by ruling that a teacher's speech to a parent was "nothing more than a job-related chore" and therefore not of public concern.

appears close to the Fourth's, though not as sweeping and, like the Fourth's, conflicts with *Connick* and *Pickering*, and with rulings of the D.C., Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits.

Acknowledging that public employees' work-related speech may involve matters of public concern is of course only the beginning of the inquiry. Government undoubtedly has broader power to regulate the speech of its employees than it does that of the general population. The Fourth Circuit majority avoids the entire inquiry, however, by reading all work-related public employee expression out of the First Amendment. *Certiorari* should be granted because this view radically departs from Supreme Court precedent as well as prevailing case law in seven other circuits.

III. THE COURT OF APPEALS' APPROVAL OF A LICENSING SCHEME THAT SINGLES OUT AND CHILLS RESEARCH AND WRITING ON "SEXUALLY EXPLICIT" SUBJECTS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS ON AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW AND IGNORES THE GOVERNMENT'S HEAVY BURDEN OF JUSTIFYING A BROAD PRIOR BAN ON PUBLIC EMPLOYEES' SPEECH

The Act singles out one large, important, but controversial branch of knowledge for burdensome regulation and public scrutiny. Any state-employed writer, researcher, professor, or librarian investigating "sexually explicit" material in the arts, literature, social science, or medicine is barred from doing so unless she or he takes the affirmative step of requesting a license, which may or may not be granted, in the unfettered discretion of the "agency head" and which, if granted -- as the Act makes a point of providing -- is then

subject to scrutiny by any politician or pressure group that chooses to make an issue over the controversial, "offensive," or "immoral" subjects being studied with taxpayer-funded resources.

As the district court perceived, both the prior restraint licensing requirement and the public disclosure provision chill academic discourse and other bona fide research about sexuality by making scholars think very carefully before requesting a license and administrators think equally hard about the possible political consequences before granting it. Pet.App. 105a-106a. Thus, contrary to the claims of the Commonwealth and the Fourth Circuit majority, the licensing scheme does not enhance institutional academic autonomy but interferes with it by imposing unnecessary and inhibiting burdens on universities and targeting research and writing on a subject of which the legislature disapproves.

The chill will be felt both by scholars studying the sadomasochistic poems of Swinburne or the lascivious nudes of Titian or Courbet, and by those in more contemporary and controversial fields such as gender, gay/lesbian, and cultural studies. The difficulty of determining in advance what might be considered "lascivious," and therefore barred absent a license, will make researchers even more cautious. *Cf. Reno v. ACLU*, 521 U.S. 844, 871-74 (1997)(noting difficulty of identifying "patently offensive' sexual content).

In *Sweezy*, Justice Frankfurter specifically noted the danger of investigation by the political branches of government into controversial academic pursuits. "Political power must abstain from intrusion into this activity of freedom," Frankfurter wrote (in a concurrence joined by Justice Harlan) -- "except for reasons that are exigent and obviously compelling . . . . It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at

once so fragile and so indispensable for fruitful academic labor." 354 U.S. at 262. Frankfurter's point, as Professor William Van Alstyne has explained, "was not that teachers may never be required to account for their teaching; it was that the social imperatives of academic freedom operate through the first amendment to require close judicial superintendence of such inquiries because of their implicitly chilling effects." William Van Alstyne, "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," 53 Law & Contemp. Probs. 79, 110 (1990).[17] This Court has made the same observation (outside the academic context) with respect to public disclosure requirements for controversial, offensive, or unpopular expression. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 96 (1982); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 754 (1996).

The Fourth Circuit's decision thus conflicts with this Court's prior restraint precedents: *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51 (1965); *City of Lakewood*, 486 U.S. 750. The dissenters explained the point well: not only do "such grants of unbridled discretion to government agents invite[] arbitrary enforcement," Pet.App. 77a, but "'the mere existence of the licensor's unfettered discretion, coupled with the power of

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[17] Similarly, petitioners do not contend that any public disclosure of scholarly research raises First Amendment problems; simply that in the context of this statute, the legislature's pointed mention of the public records law adds to the chill. *See* Michael A. Olivas, "Reflections on Professorial Academic Freedom: Second Thoughts on the Third 'Essential Freedom,'" 45 Stan. L.Rev. 1835, 1837 (1993)(academic freedom protects "the scholarly enterprise from outside interference (grand juries, witch-hunting public officials, funding agencies, and other assorted patrons, critics, and 'do-gooders'")).

prior restraint, intimidates parties into censoring their own speech . . . .'" Pet.App. 78a, quoting *Lakewood*, 486 U.S. at 757. *See also* David Rabban, "Does Academic Freedom Limit Faculty Autonomy?", 66 Tex. L.Rev. 1405, 1418-19 (1988)(a prior approval scheme for scholarly research "should strike virtually everyone as a violation of academic freedom" -- at least absent "strong evidence of actual abuses").

The decision also conflicts with this court's ruling in *NTEU*. *NTEU* requires that where government imposes a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," it bears a "heavy burden" of proving "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of government." 513 U.S. at 468, quoting *Pickering*, 391 U.S. at 571. As the dissenters and the district court demonstrated, the Commonwealth came nowhere close to satisfying the *NTEU* standard, and *a fortiori* did not satisfy the compelling state interest test that should apply to content-based restrictions on academic freedom.[18] Indeed, even casual scrutiny makes plain that policies limiting computers to professional uses address the government's concerns more effectively than the Act's content-discriminatory licensing scheme. Chief Judge Wilkinson reached a contrary conclusion by essentially abandoning the heightened scrutiny required by *NTEU*, ignoring the glaring lack of fit between the Act's restrictions and its ostensible purposes, failing to consider the ability of content-neutral rules to address computer-related workplace efficiency prob-

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[18] See *Burnham v. Ianni*, 119 F.3d at 674 (applying strict scrutiny to content-based censorship of professors' speech); *Playboy Entertainment Group v. U.S.*, 529 U.S. __, __, 120 S.Ct. 1878, 1885-87 (2000).

lems, and forgetting that for a "hostile work environment" to exist, offensive materials must be directed at a person or publicly displayed, and must be severe and pervasive. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-69 (1986).

The Fourth Circuit decision also conflicts with the Second and D.C. Circuit's analyses of employee prior restraints in *Sanjour* and *Harman*. In both cases, as in *NTEU*, the courts found the restrictions on public employee speech to be much broader than necessary to accomplish the government's goal. *Sanjour*, 56 F.3d at 99; *Harman*, 140 F.3d at 123. And, as the court in *Sanjour* said, "[f]ar from being the saving grace of this regulatory scheme -- as the government suggests -- the broad discretion that the regulations vest in the agency reinforces our belief that they are impermissible." 56 F.3d at 97; *see also Harman*, 140 F.3d at 119-20 (prior restraint aspect of the challenged regulations, vesting "unbridled discretion" in government officials, "'justifie[d] an additional thumb on the employees' side of [the] scales'"), quoting *Sanjour*, 56 F.3d at 97.[19]

These courts correctly applied *NTEU* in the context of content-neutral prior restraints on employee expression; *a fortiori* in the present case, the court of appeals erred woefully in failing to apply *NTEU*, or indeed any level of constitutional scrutiny, to the content-discriminatory, broad prior ban of the Act.

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[19] *See also Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1436 (D.C.Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 2407 (1997)(construing notice provision *not* to constitute a prior approval requirement because "insistence on advance approval" of employee publications would create serious First Amendment problems).

CONCLUSION

For the reasons stated above, the petition for *certiorari* should be granted.

Respectfully submitted,

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Dated: September 20, 2000

APPENDIX

Volume 1 of 2

OPINION ON REHEARING EN BANC
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MELVIN I. UROFSKY; PAUL SMITH;
BRIAN J. DELANEY; DANA HELLER;
BERNARD H. LEVIN; TERRY L. MEYERS,
Plaintiffs-Appellees,

v.

JAMES S. GILMORE, III, in his
official capacity as Governor of
the Commonwealth of Virginia,
Defendant-Appellant.

No. 98-1481

AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS; THE
AUTHORS GUILD; THE THOMAS
JEFFERSON CENTER FOR THE PRO-
TECTION OF FREE EXPRESSION,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge.

(CA-97-701-A)

Argued: October 25, 1999

Decided: June 23, 2000

Before WILKINSON, Chief Judge, WIDENER, MURNAGHAN, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Reversed by published opinion. Judge Wilkins wrote the majority opinion, in which Judges Widener, Niemeyer, Luttig, Williams, Traxler, and Hamilton joined. Judge Luttig wrote a concurring opinion; Judge Hamilton wrote a concurring opinion; and Chief Judge Wilkinson wrote an opinion concurring in the judgment. Judge Murnaghan wrote a dissenting opinion, in which Judges Michael, Motz and King joined.

COUNSEL

ARGUED: William Henry Hurd, Senior Counsel to the Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Marjorie Heins, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellees.

ON BRIEF: Mark L. Earley, Attorney General of Virginia, Peter R. Messitt, Senior Assistant Attorney General, Alison Paige Landry, Assistant Attorney General, Rita R. Woltz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Ann Beeson, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Louis M. Bograd, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Washington, D.C.; Michael H. Hammer, Todd G. Hartman, WILKIE, FARR & GALLAGHER, Washington, D.C., for Appellees. Jonathan Alger, Donna Euben, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, Washington, D.C.; J. Joshua Wheeler, Robert M. O'Neil, THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, Charlottesville, Virginia; Edward M. McCoyd, THE AUTHORS GUILD, New York, New York, for Amici Curiae.

OPINION

WILKINS, Circuit Judge:

Appellees, six professors employed by various public colleges and universities in Virginia, brought this action challenging the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state.[1] *See* Va. Code Ann. §§2.1-804 to -806 (Michie Supp. 1999)(the Act). The district court granted summary judgment in favor of Appellees, reasoning that the Act unconstitutionally infringed on state employees' First Amendment rights. *See Urofsky v. Allen*, 995 F.Supp. 634 (E.D.Va. 1998). A panel of this court reversed that decision, holding that our prior en banc opinion in *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 368-69 (4th Cir. 1998)(*en banc*), compelled the conclusion that the restriction on state employees' access to sexually explicit material on computers owned or leased by the state is constitutional because the Act regulates only state employees' speech in their capacity as state employees, as opposed to speech in their capacity as citizens addressing matters of public concern. *See Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999). A majority of the active circuit judges thereafter voted to hear this appeal en banc. We now hold that the regulation of state employees' access to sexually explicit material, in their capacity as employees, on computers owned or leased by the state is consistent with the First Amendment. Accordingly, we reverse the decision of the district court.

I.

The central provision of the Act states:

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[1] Appellees named George Allen, then Governor of Virginia, as defendant. Subsequently, James S. Gilmore, III was elected Governor and was substituted as a party.

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency- approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act[, Va. Code Ann. §§2.1-340.1 to -346.1 (Michie Supp. 1999)].

Va. Code Ann. §2.1-805.[2] Another section of the Act defines "sexually explicit content." When the district court ruled, and when the panel initially considered this appeal, the Act defined "sexually explicit content" to include:

> (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in §18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in §18.2-390, coprophilia, urophilia, or fetishism.

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[2] Another provision of the Act defines "agency" and "information infrastructure":

> "Agency" means any agency, authority, board, department, division, commission, institution, institution of higher education, bureau, or like governmental entity of the Commonwealth, except the Department of State Police.
>
> "Information infrastructure" means telecommunications, cable, and computer networks and includes the Internet, the World Wide Web, Usenet, bulletin board systems, online systems, and telephone networks.

Va. Code Ann. §2.1-804 (emphasis omitted).

Va. Code Ann. §2.1-804 (Michie Supp. 1998). Following our panel decision, the Virginia General Assembly amended the definition of "sexually explicit content" to add the italicized language:

> *content having as a dominant theme* (i) any *lascivious* description of or (ii) any *lascivious* picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in §18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in §18.2-390, coprophilia, urophilia, or fetishism.

Va. Code Ann. §2.1-804 (Michie Supp. 1999)(emphasis added).[3]

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[3] Section 18.2-390 provides in pertinent part:

> (2) Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.
>
> (3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a persons clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.
>
> (4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
>
> (5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the

(continued...)

As its language makes plain, the Act restricts access by state employees to lascivious sexually explicit material on computers owned or leased by the state. But, the Act does not prohibit all access by state employees to such materials, for a state agency head may give permission for a state employee to access such information on computers owned or leased by the state if the agency head deems such access to be required in connection with a bona fide research project or other undertaking. Further, state employees remain free to access sexually explicit materials from their personal or other computers not owned or leased by the state. Thus, the Act prohibits state employees from accessing sexually explicit materials only when the employees are using computers that are owned or leased by the state and permission to access the material has not been given by the appropriate agency head.

None of the Appellees has requested or been denied permission to access sexually explicit materials pursuant to the Act. Indeed, the record indicates that no request for access to sexually explicit materials on computers owned or leased by the state has been declined.[4]

Appellees maintain that the restriction imposed by the Act violates the First Amendment rights of state employees. Appellees do not assert that state employees possess a First Amendment right to access sexually explicit materials on

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[3] (...continued)

condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

Va.Code Ann. §18.2-390(2) to -390(5)(Michie 1996)(emphasis omitted).

[4] In June 1997, a machine shop supervisor in the Physics Department at the College of William and Mary requested approval under the Act to research non-work-related issues concerning his disability. An administration official determined that prior approval was not necessary to access such materials.

state-owned or leased computers for their personal use; rather, Appellees confine their challenge to the restriction of access to sexually explicit materials for work-related purposes. Appellees' challenge to the Act is twofold: They first maintain that the Act is unconstitutional as to all state employees; failing this, they argue more particularly that the Act violates academic employees' right to academic freedom.

II.

It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995)[hereinafter *NTEU*]; *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Nevertheless, the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)(recognizing that "the government as employer . . . has far broader powers than does the government as sovereign"); *Pickering*, 391 U.S. at 568 (explaining that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"). A determination of whether a restriction imposed on a public employee's speech violates the First Amendment requires "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 142 (alteration in original)(quoting *Pickering*, 391 U.S. at 568). This balancing involves an inquiry first into whether the speech at issue was that of a private citizen speaking on a

matter of public concern. If so, the court must next consider whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace. *See Pickering*, 391 U.S. at 568.

The threshold inquiry thus is whether the Act regulates speech by state employees in their capacity as citizens upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection.[5] *See Connick*, 461 U.S. at 146 (explaining that if a plaintiff's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary . . . to scrutinize the reasons for [the] discharge"); *Holland v. Rimmer*, 25 F.3d 1251, 1254-55 & n.11 (4th Cir. 1994). Whether speech is that of a private citizen addressing a matter of public concern is a question of law for the court and, accordingly, we review the matter de novo. *See Connick*, 461 U.S. at 148 n.7; *Hall v. Marion Sch. Dist. Number 2*, 31 F.3d 183, 192 (4th Cir. 1994); *Holland*, 25 F.3d at 1255.

To determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record. *See Connick*, 461 U.S. at 147-48. Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. *See id.* at 146. An in-

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[5] When a public employee's speech as a private citizen does not touch upon a matter of public concern, that speech is not "totally beyond the protection of the First Amendment," but "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick*, 461 U.S. at 147.

quiry into whether a matter is of public concern does not involve a determination of how interesting or important the subject of an employee's speech is. *See Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986). Further, the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace. *Compare Rankin v. McPherson*, 483 U.S. 378, 388-92 (1987)(holding public employee's discharge was violative of First Amendment when based on comment by employee as a private citizen on a matter of public concern made at work), with *DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995) (recognizing that speech by a public employee outside the workplace was made in the employee's official capacity).

The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart. To this end, in its decisions determining speech to be entitled to First Amendment protection the Court has emphasized the unrelatedness of the speech at issue to the speaker's employment duties. *See NTEU*, 513 U.S. at 465 (concluding that balancing test applied to employees' "expressive activities in their capacity as citizens, not as Government employees" and noting that "[w]ith few exceptions, the content of [employees'] messages [had] nothing to do with their jobs"); *id.* at 466 (emphasizing that the Court has applied the *Pickering* balancing test "only when the employee spoke as a citizen upon matters of public concern rather than as an employee upon matters only of personal interest"); *id.* at 480 (O'Connor, J., concurring in the judgment in part and dissenting in part)(agreeing that balancing test was appropriate because restriction applied only to "off-hour speech bearing no nexus to Government employment"); *Pickering*, 391 U.S. at 574 (explaining that when "the fact of employment is

only tangentially and insubstantially involved in the subject matter of the public communication made by [the employee], . . . it is necessary to regard the [employee] as the member of the general public he seeks to be"). Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." *Terrell*, 792 F.2d at 1362; *see Boring*, 136 F.3d at 368-69 (holding that the selection of a play by a high school drama teacher did not involve a matter of public concern because the choice was made by the teacher in her capacity as a teacher in a matter dealing with curriculum); *Holland*, 25 F.3d at 1255-56 (concluding that speech by supervisor disciplining subordinates was not speech as private citizen on matters of public concern because it constituted "in-house communications between employees *speaking as employees*"); *see also DiMeglio*, 45 F.3d at 805 (noting that "the [Supreme] Court [has] distinguished between speaking as a citizen and as an employee, and [has] focused on speech as a citizen as that for which constitutional protection is afforded").

This focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs. For example, suppose an assistant district attorney, at the District Attorney's direction, makes a formal statement to the press regarding an upcoming murder trial -- a matter that is unquestionably of concern to the public. It cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement.[6] In

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[6] In this respect, restrictions on speech by public employees in their ca-

(continued...)

contrast, when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen and touches on matters of public concern.

Judge Wilkinson and Judge Murnaghan fail to recognize the importance of the role of the speaker in determining

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[6] (...continued)
pacity as employees are analogous to restrictions on government-funded speech. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court rejected an argument that regulations prohibiting abortion counseling in a federally funded project violated the First Amendment rights of the staff of clinics accepting federal funds, reasoning that "[t]he employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Rust*, 500 U.S. at 199. In both situations -- public employee speech and government-funded speech -- the government is entitled to control the content of the speech because it has, in a meaningful sense, "purchased" the speech at issue through a grant of funding or payment of a salary. The limits of government control are similar in both types of cases, as well: Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program, *see id.* at 198, the government as employer is restricted in its ability to regulate the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern.

The insistence of Judge Wilkinson and Judge Murnaghan that a public employee is entitled to First Amendment protection for speech made in the course of his employment duties creates a fundamental and unnecessary schism between government-employee speech cases and government-funding cases. Under their respective analyses, a public employee would possess a First Amendment right to challenge his employer's directions regarding, for example, the preparation and content of a report, while the same directions issued with respect to a report prepared pursuant to a grant of funding would not be subject to a First Amendment challenge.

whether speech by a public employee is entitled to First Amendment protection. Under their respective analyses, the assistant district attorney in the above hypothetical would have a First Amendment right to challenge his employer's directions regarding the press conference.[7] It is difficult to imagine the array of routine employment decisions that would be presented as constitutional questions to this court under this view of the law. *See Connick*, 461 U.S. at 143 (recognizing that "government offices could not function if every employment decision became a constitutional matter").

The speech at issue here -- access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties -- is clearly made in

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[7] Judge Wilkinson writes as though he believes that professors possess a special constitutional right of academic freedom not enjoyed by other citizens. However, his statement that he applies the *Pickering* analysis solely to professors merely because "the statute's application to academic inquiry" provides "a useful illustration," *post* at 42, might indicate that he actually believes that they do not. If one reads his opinion this way, then he could be understood to believe that all public employees, not just professors, have First Amendment interests in speech made in the course of their employment duties -- a concession, even if tacit, that completely undermines the arguments and analysis that he undertakes in his opinion.

Judge Wilkinson attempts to blunt the force of any such concession by claiming that he is addressing an "as applied" challenge by Appellees. *See post* at 42 n.1. This attempt must fail for the simple reason that none of the Appellees have ever sought permission to access any materials on the Internet pursuant to the terms of the Act. *See Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir.1992)(holding that an "as applied" challenge was improper when the provision had not yet been applied to the plaintiffs); *National Commodity & Barter Ass'n v. United States*, 951 F.2d 1172, 1175 (10th Cir.1991)(same). Moreover, the text of Judge Wilkinson's concurrence -- which addresses the constitutionality of the statute as a whole, rather than with respect to any particular application -- makes clear that he is in fact responding to Appellees' facial challenge.

the employee's role as employee. Therefore, the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees. It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way. *Cf. Waters*, 511 U.S. at 675 (explaining that restrictions on speech may be necessary when "the government is employing someone for the very purpose of effectively achieving its goals"); *id.* at 672 (noting that "even many of the most fundamental maxims of . . . First Amendment jurisprudence cannot reasonably be applied to speech by government employees"); *Connick*, 461 U.S. at 143 (acknowledging that "government offices could not function if every employment decision became a constitutional matter"). The essence of Appellees' claim is that they are entitled to access sexually explicit material in their capacity as state employees by using equipment owned or leased by the state. Because, as Appellees acknowledge, the challenged aspect of the Act does not affect speech by Appellees in their capacity as private citizens speaking on matters of public concern, it does not infringe the First Amendment rights of state employees.

III.

Alternatively, Appellees maintain that even if the Act is valid as to the majority of state employees it violates the First Amendment academic freedom rights of professors at state colleges and universities,[8] and thus is invalid as to

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[8] For ease of reference, we will refer to public institutions of higher learning generally as "universities." This designation includes neither private institutions of higher learning nor public and private primary and (continued...)

them.[9] In essence, Appellees contend that a university professor possesses a constitutional right to determine for him-

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[8] (...continued)
secondary schools, as constitutional considerations applicable to such institutions are not pertinent to this appeal.

Although we discuss Appellees' argument regarding academic freedom as applying to professors, we note that in their brief Appellees asserted that "[a]cademic freedom embraces not only professors but [also] the librarians, research assistants, and other staff without whom they cannot effectively function." Brief of the Appellees at 22. And, at oral argument Appellees went so far as to suggest that the Act infringes the academic freedom of any state employee who engages in "intellectual work" analogous to the work of a professor. Of course, our determination, set forth below, that the Act does not violate any right of academic freedom possessed by university professors obviates the need to consider whether such a right could extend beyond professors. We feel compelled to note, however, the virtually limitless nature of Appellees' suggestion. Research is, by its very nature, an "intellectual" pursuit. Thus, any state employee who conducts work-related research on sexually explicit topics on the Internet -- *i.e.*, any state employee covered by the Act -- arguably would possess a constitutional right of academic freedom. We have little doubt that even the most vigorous proponent of an individual right of academic freedom would not contend that the right extends so far.

[9] Appellees assert that the Act infringes on academic freedom by hindering professors' ability to perform their employment duties, particularly teaching and research. The facts alleged in the complaint illustrate the type of restrictions with which Appellees are primarily concerned. Melvin I. Urofsky, the lead plaintiff in the district court, alleged that he had declined to assign an online research project on indecency law because he feared he would be unable to verify his students' work without violating the Act. Appellee Terry L. Meyers contended that he is affected by the Act because his ability to access Virginia's database to research sexually explicit poetry in connection with his study of Victorian poets is restricted by the policy. Appellee Paul Smith's website has been censored as a result of the Act. And, appellees Dana Heller, Bernard H. Levin, and Brian J. Delaney maintained that they were hesitant to continue their Internet research of various aspects of human sexuality.

self, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching. Appellees maintain that by requiring professors to obtain university approval before accessing sexually explicit materials on the Internet in connection with their research, the Act infringes this individual right of academic freedom. Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.

"Academic freedom" is a term that is often used, but little explained, by federal courts. *See* W. Stuart Stuller, High School Academic Freedom: The Evolution of a Fish Out of Water, 77 Neb.L.Rev. 301, 302 (1998)("[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom"); *see also* J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment", 99 Yale L.J. 251, 253 (1989) ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles"). As a result, decisions invoking academic freedom are lacking in consistency, *see* Stuller, *supra*, at 303, and courts invoke the doctrine in circumstances where it arguably has no application, *see* Byrne, *supra*, at 262-64. Accordingly, we begin with a brief review of the history of the concept of academic freedom in the United States.

Prior to the late nineteenth century, institutions of higher education in this country were not considered centers of research and scholarship, but rather were viewed as a means of passing received wisdom on to the next generation. *See* Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States 278-79 (1955);

Stuller, *supra*, at 307-08. "Faculty performed essentially fixed if learned operations within a traditional curriculum under the sanction of established truth . . . . [A]cademic freedom as we know it simply had no meaning." Byrne, *supra*, at 269. Additionally, American universities during this period were characterized by "legal control by non-academic trustees; effective governance by administrators set apart from the faculty by political allegiance and professional orientation; [and] dependent and insecure faculty." *Id.* at 268-69. This began to change, however, as Americans who had studied at German universities sought to remodel American universities in the German image. *See* Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 Tex.L.Rev. 1265, 1269 (1988).

The German notion of academic freedom was composed primarily of two concepts: *Lehrfreiheit* and *Lernfreiheit*. *See generally* Hofstadter & Metzger, *supra*, at 386-91 (discussing German understanding of academic freedom). *Lehrfreiheit*, or freedom to teach, embodied the notion that professors should be free to conduct research and publish findings without fear of reproof from the church or state; it further denoted the authority to determine the content of courses and lectures. *See id.* at 386-87. *Lernfreiheit* was essentially a corollary right of students to determine the course of their studies for themselves. *See id.* at 386.

In 1915, a committee of the American Association of University Professors (AAUP) issued a report on academic freedom that adapted the concept of *Lehrfreiheit* to the American university. *See generally* Metzger, *supra*, at 1267-85 (examining the factors influencing the AAUP's definition of academic freedom). In large part, the AAUP was concerned with obtaining for professors a measure of

professional autonomy from lay administrators and trustees.[10] *See* Byrne, *supra*, at 273-78; Metzger, *supra*, at 1275-76. The AAUP defined academic freedom as "a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or beyond the institution." Stuller, *supra*, at 309 (internal quotation marks omitted).[11] Significantly, the AAUP conceived academic freedom as a professional norm, not a legal one: The AAUP justified academic freedom on the basis of its social utility as a means of advancing the search for truth, rather than its status as a manifestation of First Amendment rights. *See* Hofstadter & Metzger, *supra*, at 398-400; Byrne, *supra*, at 277-78. The principles adopted in the 1915 report were later codified in a 1940 Statement of Principles on Academic Freedom and Tenure promulgated by the AAUP and the Association of American Colleges. *See* Richard H. Hiers, Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?, 40 Wayne L.Rev. 1, 4-5 (1993). The 1940 Statement since "has been endorsed by every major higher education organization in the nation," Byrne, *supra*, at 279, "through its adoption into bylaws, faculty contracts, and collective bargaining agreements," Amy H. Candido, Comment, A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom, 4

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[10] The AAUP was not concerned with interference from the federal or state governments, which at that time "largely refrained from any involvement in internal university affairs." Byrne, *supra*, at 273; *see* Metzger, *supra*, at 1277-79.

[11] This freedom from lay interference, however, did not mean that academics were immune from the professional judgments of their peers. *See* Byrne, *supra*, at 277-78.

U.Chi.L.Sch. Roundtable 85, 86-87 (1996-97).[12]

Appellees' insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right.[13] We disagree. It is true, of course,

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[12] In view of this history, we do not doubt that, as a matter of professional practice, university professors in fact possess the type of academic freedom asserted by Appellees. Indeed, the claim of an academic institution to status as a "university" may fairly be said to depend upon the extent to which its faculty members are allowed to pursue knowledge free of external constraints. *See* Metzger, *supra*, at 1279 (explaining that the authors of the 1915 AAUP report believed "that any academic institution that restrict[ed] the intellectual freedom of its professors . . . cease[d] to be a true university"). Were it not so, advances in learning surely would be hindered in a manner harmful to the university as an institution and to society at large. However, Appellees fail to appreciate that the wisdom of a given practice as a matter of policy does not give the practice constitutional status. *See Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984)(concluding that "[f]aculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution").

Additionally, we note that we are not here called upon to decide the wisdom of the Act as a matter of policy. That an enactment may be utterly unnecessary, or even profoundly unwise, does not affect its validity as a matter of constitutional law.

[13] Irrespective of the validity of this claim as a matter of constitutional law, we note that the argument raises the specter of a constitutional right enjoyed by only a limited class of citizens. *See* David M. Rabban, Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, 53 Law & Contemp. Probs. 227, 238 (1990). Indeed, the audacity of Appellees' claim is revealed by its potential impact in this litigation. If Appellees are correct that the First Amendment provides special protection to academic speakers, then a professor would be constitutionally entitled to conduct a research project on sexual fetishes while a state-employed psychologist could constitu-

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that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. *See, e.g., Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n.12 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978)(opinion of Powell, J.); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)(plurality opinion); *id.* at 261-63 (Frankfurter, J., concurring in the result). Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom. *Cf. Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 287 (1984) (stating that the Court has not recognized a First Amendment right of faculty to participate in academic policy-making).

Moreover, a close examination of the cases indicates that the right praised by the Court is not the right Appellees seek to establish here. Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.

We begin our examination of the cases with *Sweezy*, in which Appellees claim "[t]he Supreme Court first adopted the principle of academic freedom." Brief of the Appellees at 21. *Sweezy* arose from an investigation of "subversive activities" by the New Hampshire Attorney General. Paul Sweezy, a target of the investigation, refused to answer cer-

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[13] (...continued)
tionally be precluded from accessing the very same materials. Such a result is manifestly at odds with a constitutional system premised on equality.

tain questions regarding a guest lecture he had given at the University of New Hampshire. His refusal to answer these and other questions ultimately resulted in his incarceration for contempt. On certiorari review of the decision of the New Hampshire Supreme Court affirming the conviction, a plurality of four justices indicated that the action of the state "unquestionably" infringed Sweezy's "liberties in the areas of academic freedom and political expression." *Sweezy*, 354 U.S. at 250.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. This paean to academic freedom notwithstanding, the plurality did not vacate Sweezy's contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process. *See id.* at 254-55.

Justice Frankfurter, who along with Justice Harlan provided the votes necessary to reverse, relied explicitly on academic freedom in concluding that Sweezy's contempt conviction offended the Constitution. The right recognized

by Justice Frankfurter, however, was not the individual right claimed by Appellees, but rather an institutional right belonging to the University of New Hampshire: "When weighed against the grave harm resulting from governmental intrusion into the intellectual life *of a university*, [the] justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Id.* at 261 (Frankfurter, J., concurring in the result)(emphasis added). Justice Frankfurter emphasized "the dependence of a free society on free universities" and concluded by enumerating "the four essential freedoms of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 262-63 (internal quotation marks omitted). Significantly, at no point in his concurrence does Justice Frankfurter indicate that *individual* academic freedom rights had been infringed; in his view, the constitutional harm fell entirely on the university as an institution.[14]

In light of this review of the actual holding and rationale in *Sweezy*, it is difficult to understand how that case can be viewed as clearly "adopting" any academic freedom right, much less a right of the type claimed by Appellees. At best, it can be said that six justices agreed that the First Amendment protects values of academic freedom. However, the justices were plainly of very different minds as to the nature of this "right." And, even if *Sweezy* could be

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[14] Justice Frankfurter's reasoning, if controlling, would dictate that we uphold the Act on the basis that it does not infringe the academic freedom of the university. As explained *infra* note 17, the Act places with the university authority to approve or disapprove access to sexually explicit materials on computers owned or leased by the state. Because the Act does not subject university decisionmaking to outside interference by the state, the Act would pass constitutional muster under Justice Frankfurter's understanding of academic freedom.

read as creating an individual First Amendment right of academic freedom, such a holding would not advance Appellees' claim of a First Amendment right pertaining to their work as scholars and teachers because *Sweezy* involved only the right of an individual to speak in his capacity as a private citizen. *See id.* at 249 (explaining that "[t]he sole basis for the inquiry was to scrutinize [Sweezy] as a person," not as a teacher).

Several other cases decided at roughly the same time as *Sweezy* involved restrictions on state employees' rights as private citizens to speak and associate. *See, e.g., Whitehill v. Elkins*, 389 U.S. 54 (1967)(loyalty oath required of publicly employed teachers); *Shelton v. Tucker*, 364 U.S. 479 (1960)(affidavit listing organizational membership required of teachers at state-funded educational institutions); *Wieman v. Updegraff*, 344 U.S. 183 (1952)(loyalty oath required of state employees). Although the Court discussed the infringement of the state act on academic freedom in two of the cases, *see Whitehill*, 389 U.S. at 59-60; *Shelton*, 364 U.S. at 487, and all of the actions were brought by teachers, in none of them did the Court base its holding on academic freedom, *see Whitehill*, 389 U.S. at 59-62 (striking down provision on basis of overbreadth); *Shelton*, 364 U.S. at 490 (same); *Wieman*, 344 U.S. at 190-92 (declaring statute unconstitutional as violative of due process).

Even if *Whitehill*, *Shelton*, and *Wieman* could be said to have established a constitutional right of academic freedom enjoyed by publicly employed teachers, such a holding would be of little significance in light of the historical context. As late as March 1952, mere months before *Wieman* was decided, the Supreme Court had adhered to the principle that public employment was a privilege, not a right, and thus could be conditioned on restrictions on the exercise of constitutional rights by individuals in their capacities as private citizens. *See Adler v. Board of Educ.*, 342 U.S. 485,

492 (1952)(rejecting argument by public school teacher that statute and regulations disqualifying from employment individuals who belonged to certain organizations violated First Amendment rights). By 1956, however, the Court had begun to back away from this position. *See Slochower v. Board of Higher Educ.*, 350 U.S. 551, 555, 558-59 (1956) (holding that dismissal of professor, pursuant to statute that required termination of any public employee who invoked Fifth Amendment right against self-incrimination to avoid a question related to official conduct, violated due process; observing that "[t]o state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities"). And, by 1967, the Court had rejected it altogether. *See Keyishian*, 385 U.S. at 605-06; *see also Elrod v. Burns*, 427 U.S. 347, 358-59 (1976)(opinion of Brennan, J.)("*Keyishian* squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment"). Indeed, it is now beyond question that a public employer does not enjoy carte blanche to sanction employees for the exercise of First Amendment rights. *See Rankin*, 483 U.S. at 383-84. Therefore, to the extent that *Whitehill*, *Shelton*, and *Wieman* may have held that a publicly employed teacher may not be disciplined for the exercise of First Amendment rights as a private citizen, that holding has been subsumed by later cases extending the same protection to all public employees.

Other cases that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual. For example, in *Keyishian* the Court considered a renewed challenge to a New York statute and regulations, certain provisions of which were upheld in *Adler*, designed "to prevent the appointment or retention of 'subversive' persons in state em-

ployment." *Keyishian*, 385 U.S. at 592. *Keyishian*, like the cases discussed above, involved the right of a professor to speak and associate in his capacity as a private citizen, and thus is not germane to Appellees' claim. Moreover, in the course of reaching its conclusion that the provisions were unconstitutionally vague, the Court discussed the detrimental impact of such laws on academic freedom, which the Court characterized as "a special concern of the First Amendment." *Id.* at 603. The discussion by the Court indicates, however, that it was not focusing on the individual rights of teachers, but rather on the impact of the New York provisions on schools as institutions: The vice of the New York provisions was that they impinged upon the freedom of the university as an institution. *See University of Pa. v. EEOC*, 493 U.S. 182, 198 (1990)(noting that *Keyishian* was a case involving governmental infringement on the right of an institution "to determine for itself on academic grounds who may teach" (internal quotation marks omitted)).

This emphasis on institutional rights is particularly evident in more recent Supreme Court jurisprudence. For example, in *Bakke* Justice Powell discussed academic freedom as it related to a program of admissions quotas established by a medical school. Relying on *Keyishian* and on Justice Frankfurter's concurrence in *Sweezy*, Justice Powell characterized academic freedom as "[t]he freedom of a university to make its own judgments as to education." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). Similarly, in *Ewing* the Court described academic freedom as a concern of the institution. *See Ewing*, 474 U.S. at 226.

Significantly, the Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so. For example, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court considered a challenge to a state law that prohibited the

teaching of evolution. The Court repeated its admonition in *Keyishian* that "the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom,'" *Epperson*, 393 U.S. at 105 (quoting *Keyishian*, 385 U.S. at 603), but nevertheless declined to invalidate the statute on the basis that it infringed the teacher's right of academic freedom.[15] Rather, the Court held that the provision violated the Establishment Clause. *See id.* at 106-09. Almost twenty years later, the opportunity to create an individual First Amendment right of academic freedom again arose in *Edwards v. Aguillard*, 482 U.S. 578 (1987), another case involving limitations on public school teachers' authority to teach evolution. In *Edwards*, a state statute required that instruction on evolution be accompanied by teaching on creation science. As in *Epperson*, the Court decided the case on Establish-

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[15] Interestingly, several concurring justices criticized the discussion of academic freedom in the majority opinion. Justice Black rejected the discussion altogether:

> I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed . . . . I question whether it is absolutely certain, as the Court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

Id. at 113-14 (Black, J., concurring). Justice Harlan disassociated himself from the discussion, which he found unnecessary and likely to lead to confusion. *See id.* at 115 (Harlan, J., concurring). Justice Stewart, while not using the term "academic freedom," attempted to limit the right discussed by the majority. *See id.* at 115-16 (Stewart, J., concurring in the result)(noting that "[t]he States are most assuredly free to choose their own curriculums for their own schools," but rejecting the notion that a State could constitutionally punish a teacher for mentioning the existence of a prohibited subject (internal quotation marks omitted)).

ment Clause grounds. *See Edwards*, 482 U.S. at 596-97. This time, however, the Court did not even mention academic freedom as a relevant consideration in holding the statute unconstitutional.[16]

Taking all of the cases together, the best that can be said for Appellees' claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the "right" claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.[17]

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[16] Justice Brennan's omission of academic freedom from his majority opinion in *Edwards* is particularly noteworthy in light of his subsequent dissent in *Knight*, in which he argued that university faculty possess a constitutional right of academic freedom to participate in institutional policymaking. *See Knight*, 465 U.S. at 295-300 (Brennan, J., dissenting). Arguably, Justice Brennan believed that while faculty members were constitutionally entitled to participate in curricular decisions, they did not enjoy constitutional protection for rejecting the selected curriculum in favor of their own.

[17] In reaching this conclusion, we note that the Act places the authority to approve or disapprove research projects with the agency, here the university. Thus, the Act leaves decisions concerning subjects of faculty research in the hands of the institution. And, while a denial of an application under the Act based upon a refusal to approve a particular research project might raise genuine questions -- perhaps even constitutional ones -- concerning the extent of the authority of a university to control the work of its faculty, such questions are not presented here.

IV.

We reject the conclusion of the district court that Va. Code Ann. §§2.1-804 to -806, prohibiting state employees from accessing sexually explicit material on computers owned or leased by the state except in conjunction with an agency-approved research project, infringes upon the First Amendment rights of state employees. We further reject Appellees' contention that even if the Act is constitutionally valid as to the majority of state employees, it is invalid to the extent it infringes on the academic freedom rights of university faculty.[18] Accordingly, we reverse the judgment of the district court.

REVERSED

LUTTIG, Circuit Judge, concurring:

I join in Judge Wilkins' fine opinion for the court. I agree that the Commonwealth of Virginia may regulate its employees' access to "bestiality, lewd exhibition of nudity, . . . sexual excitement, sexual conduct or sadomasochistic abuse, . . . coprophilia, urophilia, or fetishism," on the public's computers, in the public's offices, on the public's time, and at the public's expense, without infringement on any First Amendment right of those employees. The Supreme Court's precedents would not countenance the contrary conclusion reached by Judge Wilkinson and the dissent.

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[18] Our conclusion that the Act does not infringe on protected speech is dispositive of Appellees' claim that the Act is overbroad. *See Boos v. Barry*, 485 U.S. 312, 331 (1988)(recognizing that a regulation that "does not reach a substantial amount of constitutionally protected" speech cannot be overbroad). Further, the Act is not unconstitutionally vague because it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Judge Wilkinson reaches his conclusion, writing, as he understands it, in support of academic freedom. Because of its analytical flaws and the pyrrhic victory it offers the academy, however, I believe that the true academic will understand that Judge Wilkinson's opinion ultimately will be of little service to the real cause of academic freedom, despite its superficial appeal. More importantly, however, as I explain below, the true academic is actually in no need of such attempts at support -- least of all from the federal judiciary.

From time to time, even within the confines of an Article III case or controversy, jurists express their general and personal views on subjects related (and, to be honest, often unrelated) to the particular legal issues before them. It is best that we do so infrequently, and ideally we would never do so, because such naturally gives rise to the legitimate question whether, when we do write opinions only of law, our personal views have influenced or even supplanted the dispassionate, reasoned analysis that defines the Judiciary in our constitutional scheme. At points, what Judge Wilkinson writes in his opinion might fairly be understood as more in the nature of a general statement of personal viewpoint because he comments on a range of matters legal and non-legal, including: the aggregate social impact of "subjects touching our physical health, our mental well-being, our economic prosperity, and ultimately our appreciation for the world around us and the different heritages that have brought that world about," *post* at 44; the asserted perniciousness of affirmative action and college speech codes to our cultural progress, *post* at 48; the need for intolerance of sexual harassment in every setting, *post* at 49-50; the "exponential growth of freedom" for society in general that comes with the "modern technological development" of the Internet, *post* at 49, 53; the importance of federalism in our system of governance, *post* at 52 -- and even the imperative for

judicial restraint. *Post* at 52-53.

But he does also express the opinion on the issue that is before us, that there is a First Amendment right of "academic freedom" and that other *public employees do not* possess an analogous First Amendment right to pursue matters that they believe are important to performance of their public responsibilities. Because he writes separately and does not join in either of the court's principal opinions, Judge Wilkinson's is an opinion of significance to our court. Accordingly, even though it be that of only a single judge, it is right that that analysis be subjected to the rigors of conventional legal analysis. When subjected to such analysis, I believe it is apparent that the conclusions he reaches and the means by which he reaches those conclusions are analytically indefensible.

First, it is unclear even in whom Judge Wilkinson would create his new constitutional right. For example, from reading his opinion, one cannot discern whether he is creating a right in professors generally, in only university professors, in all academics, in all institutions of learning, in only universities, in all public employees, in some of the above, or in all of the above. All that is clear is that he is emphatic that a new constitutional right must be created. If there were nothing else, one might suppose from the fact that he discusses the impact upon the academy purportedly only as "illustrative" of the Commonwealth's statute on all public employees, *see post* at 42 ("I consider the statute's application to academic inquiry as a *useful illustration* of how the statute restricts material of public concern")(emphasis added)), that he would recognize for *all* public employees the same constitutional right that he apparently would create for academics. At the end of the day, however, his analysis and conclusion confirm that indeed he would *not* recognize the same right in all public employees, and that his new-found right is reserved for professors

alone. He begins his opinion with that conclusion: "By thus preserving the structure of university self-governance, the statute withstands constitutional scrutiny." *Post* at 41. He ends his opinion with this same conclusion: "Because the limited restrictions in this Act are administered within the traditional structure of university governance, I do not believe the Virginia statute contravenes the Constitution." *Post* at 53. And his entire discussion focuses on the need for such a special right for those in the academic community. Indeed, nonacademic public employees are never mentioned by Judge Wilkinson, except in passing, and in ways that are substantively irrelevant. Judge Wilkinson simply, and quite genuinely, believes that the academy has a special contribution to make to society, beyond that that the ordinary citizen is able to make, and that its "speech" should enjoy constitutional protection that other public employees' speech should not.

Second, at the same time that Judge Wilkinson fails to identify even in whom he would vest the constitutional right that he would create, he also never defines the First Amendment right that he so unreservedly would recognize. As a court, we have before us a discrete question of law as to whether the particular speech limited by the statute we interpret is subject to the protection of the First Amendment, and the majority addresses itself to that speech and only to that speech, as a court should. Judge Wilkinson is certain that "the First Amendment does not slumber while the state regulates" the speech in question here, *post* at 41, that "the legislative scythe [has] cut[ ] a broad swath through the field of public employee speech," *post* at 41, that "some umbrella of protection" must be extended to public employee speech, lest they be "caught in the rain," *post* at 43, and that no "stream or tributary" of the "broad river of American speech [should be] shut off," *post* at 55. However, he never actually identifies the speech that he concludes is entitled to

First Amendment protection.

Thus, he begins his opinion as if the speech that he concludes is protected is the speech of "Internet access." *Post* at 41. One page later, he states that the threshold inquiry in this case, rather, is whether "the use of the Internet for academic research" relates to a matter of public concern. *Post* at 41. Four pages after that, he suggests something entirely different -- that the speech at issue, and the speech that is addressed by the statute, is "academic inquiry," and even "academic curiosity." *Post* at 44. Within the very same paragraph, he says not that it is academic curiosity, but, instead, "research in socially useful subjects such as medicine, biology, anatomy, psychology, anthropology, law, economics, art history, literature, and philosophy" that is the "matter of public concern." *Id.* In the next paragraph after that, he says that it is the "content of academic fields" which is at issue. *Post* at 44. And later in that same paragraph, he implies that it is "Internet research" that is the relevant speech. *Id.*

He vacillates between "use [of] the Internet to research and write" and "research and writing" generally as the speech of public interest in the very next paragraph. *Post* at 45. And he later suggests, in the same paragraph in which he states that it is "a professor's research projects" that is the First Amendment protected speech, *post* at 45, that it actually is the "professor's work" that is the speech on a matter of public concern, *post* at 45. And he recites in the very next sentence that it is "the content of [professorial] Internet research" that is at issue in this case, *post* at 46, only a page later, to observe that it is "[s]peech in the social and physical sciences, the learned professions, and the humanities" that is in the public interest, and this because it is "central to our democratic discourse and social progress." *Post* at 47. Two pages later still, he says it is "academic speech" that is the speech on a matter of public concern that

he addresses. *Post* at 48. On that same page, he says that it is the "informational resource" of the Internet that is the relevant speech. *Id.* And, finally, Judge Wilkinson tells us that it is "academic freedom," which he nowhere defines, that is entitled to the protection of the First Amendment, a concept that one must assume includes not only research and writing, but also teaching. *Post* at 51.

The only speech that Judge Wilkinson does not explicitly identify as relevant, and for reasons obvious, is the only speech that actually *is* relevant for purposes of the case or controversy before us. That "speech" is Internet access, on state computers and on state time, to websites that offer displays of "bestiality, lewd exhibition of nudity, . . . sexual excitement, sexual conduct or sadomasochistic abuse, . . . coprophilia, urophilia, or fetishism." Va. Code Ann. §2.1-804. And the "academic research" in particular that is proffered to this court as deserving of First Amendment protection by the professor plaintiffs, and that must be, and is, accepted by Judge Wilkinson as an example of the highest "matter of public concern," includes, as described by the district court, "graphic images of a nude woman in chains, a nude man with an erection, and a man and woman engaged in anal intercourse," *see Urofsky v. Allen*, 995 F.Supp. 634, 639 (E.D.Va.1998). Or, as that research appears in the record before us, a close-up photograph of a woman holding open her buttocks, so that her dilated anus and genitals, pierced with multiple earrings, are visible, J.A. 182; a photograph of a woman wearing a false penis and engaging in anal intercourse with another individual of unidentifiable sex, J.A. 183; a photograph of a naked man apparently hanging by his wrists from a chain to which are attached numerous sexual paraphernalia, J.A. 170; a photograph of a naked woman, spread-eagle, whose wrists and ankles have been chained and extended, J.A. 179; a photograph of a close-up of the erect genital of a man, J.A. 181; and a

photograph of a naked woman whose wrists have been padlocked together behind her back, J.A. 178. Although he never addresses himself to this speech, which is the speech at issue in the case, Judge Wilkinson says that "[t]he content and context of the speech covered by this statute leave no doubt that the law in question affects speech on matters of public concern." *Post* at 42. I agree that the fact that university professors, with no apparent pedagogical reason therefor, are accessing material like this at public taxpayers' expense, on public taxpayer time, and with public taxpayer-purchased computers -- all under the auspices of "academic research" -- is a matter of public concern, but I believe that it is so for reasons quite different from Judge Wilkinson's.

Third, even if one takes Judge Wilkinson to hold that it is "academic freedom" or "academic research" that is entitled to "the ancient safeguards of the First Amendment," *post* at 49, he does not even attempt to support the existence of such a right in either the text of the Constitution or Supreme Court precedents, or even through resort to the history or traditions of our Nation. He simply asserts that there is (and assumes that there must be) a First Amendment right in such speech, however it is defined. And this, in the face of the substantial Supreme Court and other precedent marshaled by Judge Wilkins to the effect that there is no such right, and certainly no such individual professorial right. *Ante* at 15-22. As Professor Rabban, on whom Judge Wilkinson so heavily relies for a different point, has put it:

> Fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term "academic freedom," in obvious contrast to "freedom of the press," is nowhere mentioned in the text of the first amendment. It is inconceivable that those who debated and ratified the first amendment thought about aca-

demic freedom.

David M. Rabban, Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, 53 Law & Contemp. Probs. 227, 237 (1990). Thus, although Judge Wilkinson trumpets judicial restraint when explaining (as to an issue that is not before the court today) that courts must be reticent to review the decisions of deans and other university administrators on whether to grant research waivers under the statute at issue, post at 52 ("It is well-established that federal courts have no business acting as surrogate university deans"), his fanfare can hardly be heard over the clashing from his own unabashed creation of new constitutional rights out of whole cloth -- an unabashedness that forces his surrender of the high ground that he has assumed in the debate over judicial activism. *See, e.g.*, *Gibbs v. Babbitt*, No. 99-1218, 2000 WL 726073, at *7 (4th Cir. June 6, 2000)(Wilkinson, J.)("The irony of disregarding limits on ourselves in the course of enforcing limits upon others will assuredly not be lost on those who look to courts to respect restraints imposed by rules of law"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163 (4th Cir. 2000)*(en banc)*(Wilkinson, J.)("This case illustrates at heart the importance of judicial restraint"); *Johnson v. Collins Entertainment Co., Inc.*, 193 F.3d 710, 725-26 (4th Cir. 1999) (Wilkinson, J.)("Legal constraints cannot yield even to the noblest of intentions, for judicial visions of the social good will differ from issue to issue and from judge to judge, and will, if allowed to run unchecked, thwart the expression of the democratic will").

Fourth, when, in all but afterthought, Judge Wilkinson finally does turn to the determinative *Pickering* balance, he ignores the critical aspect of that analysis as set forth by the Supreme Court: the question whether the plaintiffs are speaking in their roles as citizens or in their roles as employees. In all three of its seminal cases on public employ-

ee speech, the Supreme Court has placed heavy emphasis on whether the speakers in question were acting in their roles as employees. In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), a case in which the Court extended protection to a teacher's letter to a newspaper concerning school budgeting, the court emphasized that "the fact of employment [was] only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher," and that, *for that reason*, it was "necessary to regard the teacher as the member of the general public he [sought] to be." *Id.* at 574. In *Connick v. Myers*, 461 U.S. 138 (1983), which presented the question whether a prosecutor could be fired for circulating a questionnaire in her workplace, the Court made the importance of the employee/citizen distinction clear in its very holding sentence: "We hold only that when a public employee speaks not as a *citizen* upon matters of public concern, but instead as an *employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision . . . ." *Id.* at 147. (emphasis added). Finally, and ironically, *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the authority relied on most extensively by Judge Wilkinson, provides perhaps the most powerful indictment of Judge Wilkinson's failure to address the employee/citizen distinction. There, in striking down a law banning federal government employees from collecting honoraria for speaking or writing, the Court emphasized that:

> [The plaintiff-government employees] seek compensation for their expressive activities *in their capacity as citizens, not as Government employees.* They claim that their employment status has no more bearing on the quality or market value of their literary output than it did on that of Haw-

> thorne or Melville. With few exceptions, the content of the [government employees'] messages *has nothing to do with their jobs* and does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co-workers or supervisors; instead, they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

Id. at 465. (emphasis added). Thus, although the public concern/personal interest distinction is no doubt of importance under *Connick*, the citizen/employee distinction is, by force of these three authorities, equally so, at the very least.

Judge Wilkinson never quotes or otherwise references any of these key passages from *Pickering*, *Connick*, and *NTEU*. Indeed, in the only passage in which Judge Wilkinson makes any reference to the fundamental distinction between the individual acting in his role as employee and the individual acting in his role as citizen, he criticizes our court and the Commonwealth for our over-emphasis on it. *See post* at 42 ("[T]he majority . . . goes astray by placing exclusive emphasis on the fact that the statute covers speech of 'state employees in their capacity as employees'"); *compare id. with Boring v. Buncombe County Bd. of Education*, 136 F.3d 364, 375, 379 (Motz, J., dissenting)("Conceivably, the majority's holding is grounded in misreading *Connick* to make the role in which a public employee speaks determinative of whether her speech merits First Amendment protection"). And, in effect to read the employee/citizen distinction out of *Pickering* and its successors altogether, Judge Wilkinson eventually completely merges the employee/citizen analysis into the public concern/private

analysis, criticizing the Commonwealth for "begin[ning] and end[ing] the public concern inquiry with the signature on the plaintiffs' paychecks or the serial number on their computers." *Post* at 46. Thus, by the time he is through, although seemingly without even realizing that he has done so, Judge Wilkinson has purged altogether from *Connick* and *Pickering* the public employee/private citizen analysis that he himself has consistently held is critical. *See, e.g., Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir. 1998) (Wilkinson, J.)("By Responding to the Board's invitation to testify at a public hearing and by cooperating with law enforcement investigators, Robinson and Marc spoke not in their 'capacity as . . . public employee[s],' *DiMeglio*, 45 F.3d at 805, but as 'citizen[s] upon matters of public concern.' *Connick*, 461 U.S. at 147, 103 S.Ct. 1684").

It is unsurprising that Judge Wilkinson would avoid the question whether the plaintiffs here are speaking in their roles as public employees or in their roles as private citizens, because in the answer to that question lies the refutation of the constitutional right that Judge Wilkinson concludes exists. For, when university professors conduct university research on university time, on university computers, and in conduct of their university duties, it is indisputable that they are performing in their role as public employees of the university, even though Judge Wilkinson is unwilling to accept as much. *See post* at 45 ("[I]n their research and writing university professors are not state mouthpieces -- they speak mainly for themselves"). They are as different as can be imagined from the teacher who wrote to the newspaper in *Pickering*, the prosecutor who circulated the questionnaire in *Connick*, or the federal government employees who gave speeches and wrote articles for the general public in *NTEU*. The professors' research is conducted on computers and via Internet access services that are both paid for by the public; thus, the professors' research is itself

paid for by the people of the Commonwealth of Virginia. Indeed, the professors are paid *to conduct* the research that they do. The professors' research thus belongs to the public (at least in the only sense that matters here). In a word, when conducting their research so that they may better discharge their professorial responsibilities to the public, these professors are speaking qua public employees, not qua private citizens. I cannot imagine that anyone would contend otherwise. Certainly, the professors before us are not so brazen as to do so.

Fifth, with respect to those portions of the *Pickering* analysis to which Judge Wilkinson does address himself, not only does he identify incorrectly the employee speech to be balanced, he incorrectly identifies the corresponding state interest that would be balanced were he correct that that employee speech was the relevant speech under *Pickering*.

Thus, consistent with his exclusive focus on academic speech in the first half of his opinion in which he identifies the employee speech at issue -- which focus he said at that point was "illustrative" only, *see post* at 42 -- he identifies as the entirety of the relevant employee speech for purposes of his *Pickering* balance the academic speech discussed in the first half of his opinion. (At this point in his opinion, Judge Wilkinson is unwilling to assert that this speech relates to a matter of public concern; rather, he says only that it "potentially touches on" such matters. *Post* at 50). If one chooses to balance only the academic employees' interests, as does Judge Wilkinson, then one must balance against that interest only the governmental interest in regulation of that academic speech, not the government's interest in regulation of that same kind of speech by all of the state's public employees, as does Judge Wilkinson. *And the only principled conclusion that one can reach upon thus properly balancing the correct interests is that the Commonwealth's statute cannot stand -- a consequence that*

Judge Wilkinson (even at the cost of analytical incredibility) is unwilling to accept. For, if the academic employees' First Amendment interests are as profound as Judge Wilkinson believes them to be, then the government's interest in regulating the university professors' private access to the prohibited materials for individual research purposes pales by comparison.

That is, it is unquestionable not only that academic research in general is of utmost importance, but also that there could well be legitimate research that would entail, if not necessitate, access to the very kinds of material to which access is prohibited by the Commonwealth's statute. And it is also unquestionable that an individual professor's private access to such materials in the sanctity of his own office would have little, if any, disruptive effect on the workplace at all. Indeed, I cannot imagine a governmental interest either specific to university professors or equally applicable to them as to any other public employee that would override those academic freedom interests. And, obviously, neither can Judge Wilkinson, despite his affirmance of the Commonwealth's statute on the very ground that the state's interest in the avoidance of workplace disruption surpasses the professors' First Amendment right to research the matters proscribed by the statute. Not only does he identify none at all; he does not even attempt to do so. In fact, the state's interest in avoidance of workplace disruption, that Judge Wilkinson balances against the professors' interest in "academic freedom," is wholly unattributable to the professor plaintiffs. *See post* at 49 ("The posting of such material on web sites in state offices has led to workplace disruption and complaints that such sexually graphic matter contributes to a hostile work environment").

In other words, if one really believed that there is an actual constitutional right to academic freedom and that it is a right of the importance believed by Judge Wilkinson, then

he would unhesitatingly *invalidate* the Commonwealth's statute as urged by the professor plaintiffs (at least as applied to them) -- not sustain it and dismiss the plaintiffs' research as "abuse" and "misconduct," as does Judge Wilkinson, *post* at 49-50 -- because the state's interest in limiting individual professor access to the proscribed material within the privacy of the professor's own office is, and obviously so, comparatively insignificant to the professor's interest in academic freedom. It is for this reason that Judge Wilkinson's seemingly bold recognition of a constitutional right in the university professors is but a pyrrhic victory (indeed, as it is indirectly for all public employees), because it is a right that must yield to the subjective and uninformed views of the federal judiciary, and even beyond that, to the most negligible of governmental interests.

Of course, it is not academic speech alone that must be balanced under *Pickering*, contrary to Judge Wilkinson's belief. It is the speech of all public employees who would engage in "research" that must be balanced against the state's interest in the regulation of this particular speech by all of its employees. The consequence of this proper balancing, however, is that one is unable to recognize a special First Amendment right in academics over all other public employees -- a consequence that Judge Wilkinson likewise is unwilling (also at the cost of analytical incredibility) to accept.

Sixth, and most tellingly, in his understandable haste to express disapproval of the material to which access has been denied by the Commonwealth, Judge Wilkinson actually does not perform any balancing at all -- none at all. The total of his reasoning on the *Pickering* balance is that the Commonwealth's *revised* statute "restricts a more limited range of material" than its *predecessor* statute, *post* at 51 -- which of course is to say nothing as to the relative weight of the respective employee and governmental interests.

Given the complete absence of any attempt at the Supreme Court-required balancing of interests under *Pickering*, the only reasonable conclusion that can be drawn is that, at least by this point in his opinion, Judge Wilkinson knows well that the result of that balancing would be precisely opposite that which he wishes to reach. That balancing would yield either the validation of the Commonwealth's statute as to all employees of the State, not just the State's academic employees, or the invalidation of the statute as to all of the State's employees, academic and nonacademic alike.

Judge Wilkinson believes that he has undertaken the substantive equivalent of the required balancing of interests in reaching his conclusion that the state's interests outweigh those of the relevant public employees, because he goes on to consider that the statutory waiver power resides in the university itself and thus that the intrusion on the public employees' speech interests is "minimal." *Post* at 51. Of course, in neither substance nor form is this the equivalent of the *Pickering* balance.

However, even if one views the waiver provision as a free-floating savings provision somehow related to the required *Pickering* balance, as Judge Wilkinson mistakenly does, then that provision should not have the constitutional effect that Judge Wilkinson concludes it has. If one believes, as does he, that the constitutional right of "academic freedom" belongs to the individual university professor, then the fact that the state government, acting through the university's administration, holds the power of censorship cannot possibly be viewed as a feature that *saves* the statute from unconstitutionality. It may be that, if put to the choice, every professor would rather have the power of censorship rest with their academic colleagues than with the state's elected officials. However, no professor would believe that his right of academic freedom is safeguarded merely because it can be denied only by his politically accountable univer-

sity administrators, as this litigation -- brought by professors *notwithstanding the state's conferral of the waiver authority upon the university* -- proves. In fact, as one of the professors on whom Judge Wilkinson relies extensively explained in the article on which Judge Wilkinson relies, the seminal academic definition of "academic freedom" was itself derived in response to "threats to professors from university trustees." David M. Rabban, Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, 53 Law & Contemp. Probs. 227, 229 (1990)("Threats to professors from university trustees loomed behind the seminal professional definition [of academic freedom] produced in 1915 by a committee of eminent professors for the first annual meeting of the American Association of University Professors ('AAUP')").

But, even more fundamentally, the university does not exercise the waiver authority with respect to the vast number of public employees as to whom the Commonwealth's statute also applies, a fact that is ignored by Judge Wilkinson. *Compare post* 51 (observing that "[u]nder the Act, the ultimate judgment on whether a requested waiver is for a bona fide research project resides in the system of university governance") *with id.* (noting in next sentence that "[t]he statute grants 'agency heads' the authority to approve these waivers"). The waiver provision may, in Judge Wilkinson's view, save the Commonwealth's statute from constitutional infirmity when the statute is applied against the university professor, because it represents the repository of the critical authority of self-governance in the institution itself, rather than in the state. *See id.* But one may be assured that Judge Wilkinson would not so view the waiver provision when the statute is applied instead against the ordinary public servant, who is "left in the rain" by Judge Wilkinson. For the ordinary public servant, to confer the waiver authority in the relevant state department head

would be, in Judge Wilkinson's words, to consign that employee's speech to "a First Amendment netherworld." *See post* at 48.

Finally, Judge Wilkinson's opinion in concurrence today is, it should come as no surprise, irreconcilable with our own Circuit's precedent in *Boring v. Buncombe County Bd. of Education*, 136 F.3d 364 (4th Cir. 1998), an opinion in which he joined at the time. In *Boring*, we held unequivocally, against a First Amendment challenge indistinguishable from that here, that a high school teacher does not have a First Amendment right in the secondary school's curriculum itself. Judge Wilkinson, understanding the incompatibility of his position in *Boring* with the position he takes today, distinguishes *Boring* on the ground that, unlike curriculum choices, a professor's research and writing does not bear the imprimatur of government. *See post* at 45. *Boring*, of course, did not rest upon any such notion of official imprimatur. It rested, instead, as we said, solely on the firm belief that the teacher possessed no First Amendment right in the curriculum itself; that this was the rationale for our decision is as clear from Judge Motz's dissent as it is from the text of the majority opinion. To attempt to distinguish *Boring* on the ground of official imprimatur is to betray at once not only disagreement with the essential holding of that case, but fundamental agreement with the dissent in that case. *Compare post* at 42 (Judge Wilkinson asserting that the "'content of the speech [here] surely touches on matters of political and social importance" *with Boring*, 136 F.3d 375, 378 (Motz, J., dissenting)("Although Boring's in-class speech does not itself constitute pure public debate, obviously it does 'relate to' matters of overwhelming public concern . . . ."); *see also id.* at 379. If research and writing is "a matter of public concern" within the intendment of *Connick* and *Pickering*, as Judge Wilkinson believes it is, then surely far more "a matter of public concern" is the curriculum of

our elementary and secondary schools, and consequently far clearer is the elementary and secondary school teachers' First Amendment right to participate in, if not direct entirely, the curriculum of our young.[1]

The factual assertion on the basis of which Judge Wilkinson would distinguish *Boring* is itself revealing of the doctrinal conundrum in which he finds himself vis-a-vis *Boring*. For his needed distinction of *Boring*, Judge Wilkinson asserts that, when professors research and write, "they speak mainly for themselves," *post* at 45, a declaration in support of which he can cite but a lone academic article from Law & Contemporary Problems, *see id.* (citing David M. Rabban, Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, 53 Law & Contemp. Probs. 227, 242-44 (1990)). If it is the case that the public university's professors operate independently of state supervision and public accountability, then it is a surprise to me. And I am confident that it would come as a surprise to the public, who pays the professors' salaries in order that they may conduct important research for the public and without whose tax money the professors' research and writing would not be possible.

I do not chronicle these analytic flaws in Judge Wilkinson's analysis for the sake of chronicling. Collectively, each building upon the other, these errors disguise, I believe even from Judge Wilkinson, the uncomfortably counter-

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[1] Elsewhere in his concurrence, when the need is different, Judge Wilkinson presents *Boring* as a decision chiefly premised not on official imprimatur, but, rather, on the necessity of institutional governance. *Post* at 51-52; *see* discussion *supra*. *Boring* was no more about institutional governance than it was about official imprimatur. There is not even a hint in our opinion in *Boring* that we would have viewed a state statute forbidding the teaching of lesbianism any differently than we viewed the high school's forbiddance -- nor, given our reasoning, would one ever expect to find such a suggestion in the opinion.

precedential and counter-intuitive conclusions that he can, as a result, reach seemingly quite comfortably. If one does not identify in whom a particular right would be created, then he need never confront the consequences of the principled extension of the same right to the similarly situated. If one does not identify the actual right that is created, then he is never obliged to reconcile the creation of that right with the precedent extant. If one ignores the critical step of the established analysis, then he has preordained his conclusion. If one places a thumb on the scale of the determinative balance, then the resulting measure will be the foreseeable consequence of that weighted balance. And if one conducts no balancing at all, then the measure will be that which he, and he alone, tells us it is.

The true academic should find small comfort in such a defense of his academic freedom.

In reality, however, the true academic is in no need of defense. The court holds today, as has been uniformly recognized by the Supreme Court through the years, only that there is no *constitutional* right of free inquiry unique to professors or to any other public employee, that the First Amendment protects the rights of all public employees equally. Neither the value nor the contributions of academic inquiry to society are denigrated by such a holding. And to believe otherwise is to subscribe to the fashionable belief that all that is treasured must be in the Constitution and that if it is not in the Constitution then it is not treasured. But precisely because it is a constitution that we interpret, not all that we treasure is in the Constitution. Academic freedom is paradigmatic of this truism. Academic freedom, however, is also paradigmatic of the truism that not all that we treasure is in need of constitutionalization. No university worthy of the name would ever attempt to suppress true academic freedom -- constrained or unconstrained by a constitution. And, if it did, not only would it find itself without its faculty; it

would find itself without the public support necessary for its very existence. The Supreme Court has recognized as much -- be it through wisdom, prescience, or simple duty to the Constitution -- for over two hundred years now. It has recognized that, in the end, the academic can be no less accountable to the people than any other public servant. His speech is subject to the limitations of the First Amendment certainly no more, but just as certainly no less, than is the custodian's. That we should all be accountable to the people, and accountable equally, should cause none of us to bridle.

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HAMILTON, Senior Circuit Judge, concurring:

The Appellees claim that they have a First Amendment right to access and disseminate sexually explicit materials on computers that are owned or leased by the Commonwealth. The Appellees' access to, and dissemination of, sexually explicit materials is necessary for them to perform their duties as educators; but, nevertheless, the Appellees' access to, and dissemination of, sexually explicit materials is accomplished in their capacities as state employees. Because the Appellees' access to, and dissemination of, sexually explicit materials is accomplished in their capacities as state employees, the court today correctly concludes under the implicit holding of our *en banc* decision in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir.)(*en banc*), *cert. denied*, 119 S.Ct. 47 (1998), that the speech in this case is employee speech, and, therefore, not entitled to First Amendment protection. Furthermore, the court correctly rejects the Appellees' contention that even if the Act is constitutionally valid as to the majority of state employees, it is invalid to the extent it infringes on the academic freedom rights of university faculty.

I joined Judge Motz's dissent in *Boring* which persuasively explains why a public employee should enjoy far greater First Amendment protection than that contemplated by *Boring*. *See id.* at 378-80. Left to my own devices, I would hold that the Appellees' speech in this case is entitled to some measure of First Amendment protection, thus triggering application of the *Connick/Pickering* balancing test. However, being bound by the *en banc* court's decision in *Boring*, a decision the *en banc* court chose not to revisit in the present case, I concur in the court's majority opinion.

Finally, I write separately to make clear that we leave unanswered the question of whether a governmental employee who seeks to access and disseminate sexually explicit materials rising to the level of matters of public concern, not in his or her role as a governmental employee, but rather as a private citizen, is entitled to some measure of First Amendment protection. The facts of this case leave that issue for another day.

WILKINSON, Chief Judge, concurring in the judgment:

I agree with the majority that the Virginia Act is constitutional. Unlike the majority, I believe that this statute restricts matters of public concern, especially in the context of academic inquiry. The state, however, has a legitimate interest in preventing its employees from accessing on state-owned computers sexually explicit material unrelated to their work. Here the Commonwealth has promoted this legitimate interest through minimally intrusive means, *i.e.*, by permitting university officials to grant waivers for all bona fide research projects. By thus preserving the structure of university self-governance, the statute withstands constitutional scrutiny.

I write separately because the majority accords the speech and research of state employees, including those in

universities, no First Amendment protection whatsoever. While the statute may ultimately be constitutional, the First Amendment does not slumber while the state regulates speech on matters of vital public importance.

I.

Although the restrictions on Internet access in this statute may appear to pose a novel question, I agree with the majority that it is amenable to traditional analysis through the framework for public employee speech established in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). But because the statute at issue regulates a broad range of speech, its widespread impact "gives rise to far more serious concerns than could any single supervisory decision." *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995) ("*NTEU*"). Moreover, the Act's restriction constitutes a prior restraint because it chills Internet research before it happens. *Cf. Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Unlike *Pickering* and its progeny, the statute does not "involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities." *NTEU*, 513 U.S. at 467. Rather, this statute involves a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *Id.* When the legislative scythe cuts such a broad swath through the field of public employee speech, *Pickering* and *NTEU* require us to carefully consider the First Amendment interests at stake.

The threshold inquiry in this case is whether the use of the Internet for academic research relates to a matter of "public concern." *Connick*, 461 U.S. at 147; *Robinson v. Balog*, 160 F.3d 183, 187-89 (4th Cir. 1998); *DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995). To make this determination *Connick* requires that we closely examine the "content, form, and context" of the speech at issue. 461

U.S. at 147-48.

While the majority undertakes this same inquiry, it goes astray by placing exclusive emphasis on the fact that the statute covers speech of "state employees in their capacity as employees." Whether speech is undertaken as a citizen or public employee is certainly relevant to the analysis. However, it is not the only inquiry. By making it the dispositive criterion, the majority rests its conclusions solely on the "form" of the speech. The public concern inquiry, however, does not cease with form. The majority fails to examine the "content" of the speech, which surely touches on matters of political and social importance. It also fails to examine the "context" of the speech, which can occur in a variety of settings, including the public university. As this case was brought by public university professors, I consider the statute's application to academic inquiry as a useful illustration of how the statute restricts material of public concern.[1] The content and context of the speech covered by this statute leave no doubt that the law in question affects speech on matters of public concern.

To take the matter of content first, if the speech at issue were primarily of personal workplace interest to the plaintiffs, it is clear that no First Amendment significance would attach to it. Public employee speech is not entitled to protection if it is of"purely personal concern to the employee -- most typically, a private personnel grievance." *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985)(internal quotation marks omitted). For instance, in *Connick*, Assistant

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[1] Appellees here are public university professors who raised both facial and as-applied challenges to the statute. To prevail on their facial challenge, plaintiffs "must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183 (internal quotation marks omitted). By finding the statute valid as applied to these plaintiffs, the facial challenge fails as well.

District Attorney Sheila Myers was informed that she would be transferred. 461 U.S. at 140. She protested the transfer and distributed a questionnaire soliciting the views of her colleagues. She was then terminated because of her refusal to accept the transfer and her insubordination in distributing the questionnaire. *See id.* at 141. The Supreme Court held that with but one exception the questions Myers asked did not touch on matters of public concern because they were nothing more than "mere extensions of Myers' dispute over her transfer." *Id.* at 148. Similarly, in *Terrell v. University of Texas System Police*, the Fifth Circuit found that a police captain's diary that was critical of a supervisor did not constitute speech on a matter of public concern. 792 F.2d 1360, 1362-63 (5th Cir. 1986). And in *Holland v. Rimmer*, we found that internal employee discipline by a director of a county agency was not speech on a matter of public concern. 25 F.3d 1251, 1255-56 (4th Cir. 1994). All of these cases involved speech that related to personal workplace disputes and did not involve "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146.

By contrast, speech found to be of public concern covers an array of subjects stretching beyond the narrow confines of personal workplace disputes. Courts have focused upon "whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression." *Berger*, 779 F.2d at 999; *see also Pickering*, 391 U.S. at 573 (emphasizing the "public interest in having free and unhindered debate on matters of public importance"). For example, in *Pickering*, a school teacher was dismissed for sending to a newspaper a letter that was critical of the Board of Education for the way it handled past proposals to raise new revenue for schools. 391 U.S. at 564. The Court held that the letter touched on matters of "legitimate public concern" because on such questions of

school funding "free and open debate is vital to informed decision-making by the electorate." *Id.* at 571-72. In *NTEU*, two unions and several career civil servants challenged a statute that forbade federal employees from accepting honoraria. 513 U.S. at 461. The employees received compensation for speaking and writing on a variety of topics -- a mail handler lectured on the Quaker religion, an aerospace engineer lectured on black history, and a microbiologist reviewed dance performances. *See id.* The Court found that these expressive activities "fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." *Id.* at 466. The First Amendment thus affords public employee speech some umbrella of protection -- those, however, with purely personal workplace disputes will get caught in the rain.

The statute at issue here addresses speech that is quite unrelated to personal grievances about the workplace. The content of academic inquiry involves matters of political and social concern because "academic freedom is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Academic inquiry is necessary to informed political debate. Academic curiosity is critical to useful social discoveries. One cannot possibly contend that research in socially useful subjects such as medicine, biology, anatomy, psychology, anthropology, law, economics, art history, literature, and philosophy is not a matter of public concern. The content of this research does not involve a professor's wages or working conditions. Rather it concerns an aggregate of subjects with broad social impact -- subjects touching our physical health, our mental well-being, our economic prosperity, and ultimately our appreciation for the world around us and the different heritages that have brought that world

about.[2] The right to academic inquiry into such subjects cannot be divorced from access to one means (the Internet) by which that inquiry is carried out. By restricting Internet access, a state thus restricts academic inquiry at what may become its single most fruitful source.

Not only does the content of these academic fields support the conclusion that these are matters of public concern, the context of the affected speech is unique. In the university setting "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Internet research, novel though it be, lies at the core of that tradition. These plaintiffs are state employees, it is true. But these particular employees are hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern. A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives. *See* William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, 53 Law & Contemp. Probs. 79, 87 (1990). Provocative comment is endemic to the work of a university faculty whose "function is primarily one of critical review." *Id.*

Furthermore, state university professors work in the context of considerable academic independence. The statute limits professors' ability to use the Internet to research and to write. But in their research and writing university pro-

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[2] As such, a statute of general applicability differs from individual disputes over hiring, tenure, and promotion, which courts have routinely regarded as matters of personal workplace rather than public concern. *See, e.g., Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 425-26 (1st Cir. 1986); *Megill v. Board of Regents of the State of Fla.*, 541 F.2d 1073, 1085 (5th Cir.1976).

fessors are not state mouthpieces -- they speak mainly for themselves. *See generally* David M. Rabban, Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, 53 Law & Contemp. Probs. 227, 242-44 (1990). It is not enough to declare, as the majority does, "The speech at issue here . . . is clearly made in the employee's role as employee." *Ante* at 11. No one assumes when reading a professor's work that it bears the imprimatur of the government or that it carries the approval of his or her academic institution. University research and writing thus differ fundamentally from secondary school curriculum selection, in which we have held that the desires of the individual teacher must give way to local school board policies. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370-71 (4th Cir. 1998) (*en banc*).[3] Curricular choices uniquely can be perceived by "students, parents, and members of the public . . . to bear the imprimatur of the school." *Id.* at 368 (internal quotation marks omitted).[4] The interest of the state in a professor's research

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[3] It should go without saying that I adhere to my vote and views in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998)(*en banc*), *see also id.* at 371-72 (Wilkinson, C.J., concurring). The distinctions between that case and this one, however, are numerous. *Boring* involved an individual employment decision pertaining to curriculum at the secondary school level. By contrast, this case involves a broadly applicable statute unrelated to curriculum at the level of higher education. To find that the statute in this case impacts non-curricular speech in colleges and universities and that such speech is a matter of public concern in no way weakens the *Boring* holding.

[4] In his concurring opinion, my brother Luttig thus wrongly asserts that "*Boring*, of course, did not rest upon any such notion of official imprimatur." *Ante* at 36. Indeed, courts dealing with the question of First Amendment rights concerning curriculum choices have limited their holdings to curriculum matters in light of the distinctly institutional character of curriculum decisions: "[A] public university professor does

(continued...)

projects is simply not as all-encompassing.

The Commonwealth has nonetheless insisted that professors have no First Amendment interest in the content of their Internet research. It rests this breathtaking assertion on two props: that the professors are state employees, and that the computers are state-owned. *See* Appellant's Br. at 12 ("The speech at issue here is speech by state employees in the performance of their governmental duties. *This is not citizen speech; it is government speech*"); *id.* ("[T]he Act governs such speech only insofar as state employees seek to use *state computers*. This is a legitimate exercise of control by government over its own property . . . .").

Put simply, *Connick* does not support the Commonwealth's leap. To begin and end the public concern inquiry with the signature on plaintiffs' paychecks or the serial number on their computers would be to permit all manner of content- and viewpoint-based restrictions on speech and research conducted in our universities. The Commonwealth acknowledges as much. *See* Appellant's Reply Br. at 14. ("'[G]overnment-as-speaker' as well as 'government-as-buyer' may constitutionally engage in content and viewpoint discrimination"). It cannot be true, however, that on university campuses the First Amendment places no limits on the Commonwealth's proprietary prerogative -- a prerogative that it claims here in sweeping terms. *See id.* at 29 ("[T]he Internet remains as free as the open sea and anyone who wishes may sail there; but the Commonwealth's boats

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[4] (...continued)
not have a First Amendment right to decide what will be taught in the classroom." *Edwards v. California Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998). "Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula." *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir.1989).

are the Commonwealth's business, and no one can take them out without the Commonwealth's permission"). Under this view, if the Commonwealth were to declare that certain politically sensitive subjects could not be researched on state computers by state employees holding politically objectionable views, the statutory restriction must be upheld.

By embracing the Commonwealth's view that all work-related speech by public employees is beyond public concern, the majority sanctions state legislative interference in public universities without limit. The majority's position would plainly allow the prohibition of speech on matters of public concern.[5] The worry over undue intrusion is not mere tilting at windmills -- the Commonwealth's original Internet access restrictions were stunning in their scope. For example, the Act originally barred access to all materials having "sexually explicit content" without regard to whether the depiction was "lascivious" or whether it constituted the material's "dominant theme." *Compare* Va. Code Ann. §2.1-804 (Michie Supp. 1998), *with* Va. Code Ann. §2.1-804 (Michie Supp. 1999). As the panel opinion noted, this restriction swept within its ambit "research and debate on sexual themes in art, literature, history, and the law; speech and research by medical and mental health profes-

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[5] The majority's hypothetical involving an assistant district attorney serves further to illustrate the drawbacks of its approach. In focusing once again solely on the form of speech, the majority ignores the different context between its hypothetical and the present case. Assistant district attorneys operate under a chain of supervision and command and their words would be taken to represent the government's position on a given matter. This differs so dramatically from the context of the present speech that it is hard to believe that the majority would even seek to draw a comparison. All this is quite apart from the fact that the majority's assistant district attorney hypothetical represents an individual employment matter that (academic or otherwise) is less likely to involve matters of public concern than a broad statutory restriction on speech.

sionals concerning sexual disease, sexual dysfunction, and sexually related mental disorders; and the routine exchange of information among social workers on sexual assault and child abuse." *Urofsky v. Gilmore*, 167 F.3d 191, 195 n.6 (4th Cir. 1999). These are areas of more than mere personal interest. Speech in the social and physical sciences, the learned professions, and the humanities is central to our democratic discourse and social progress.

The majority's reasoning could also be used to uphold statutes that otherwise would fall for overbreadth and vagueness. A prime example is speech codes that have the potential to suppress classroom speech that is unconventional or unorthodox. Courts have repeatedly invalidated these codes for trampling on First Amendment freedoms. *See Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995)(finding policy against discriminatory harassment unconstitutionally vague and overbroad); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993)(holding that university cannot maintain gender-neutral educational environment by silencing speech on the basis of viewpoint). These speech codes are often exceptionally broad. For instance, one university code forbids "'any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or . . . using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.'" *See Dambrot*, 55 F.3d at 1182 (quoting the Plan for Affirmative Action at Central Michigan University). A statute could be passed that has similarly broad terms reaching substantial amounts of protected speech. Yet under the majority's reasoning, such statutes would not implicate any First Amendment

rights because they would regulate university professors only as state employees, and therefore would not involve matters of public concern. The majority provides no way to distinguish the statute at issue here from more intrusive future statutes. Under the majority's rationale, whenever state employees are regulated as state employees, their speech lies outside the realm of "public concern." Thus, regardless of the statute, there is no balancing of the competing First Amendment and state interests. This relegates academic speech to a First Amendment netherworld.

The Supreme Court has recognized that "the university is a traditional sphere of free expression . . . fundamental to the functioning of our society." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). Further, "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Thus the Commonwealth's ownership of the plaintiffs' computers or communication lines cannot end our analysis. Virginia also owns the chairs on which plaintiffs sit and the desks at which they work. But the Commonwealth does not thereby "own" their every thought and utterance. As cyberspace expands, web pages may provide more and faster access to information that will contribute to the understanding of social problems and ultimately to solutions for them. Insofar as public employees are concerned, the majority would allow the state to shut down this informational resource at its whim. It is remarkable that Internet research with all its potential falls outside the majority's conception of public concern. Discarding the ancient safeguards of the First Amendment is no way to welcome this modern technological development.

II.

Because the Act restricts speech on matters of public concern, we must determine whether the burden on speech

is justified by the governmental interest at stake. *See Pickering*, 391 U.S. at 568. Because of the widespread impact of the statute, "the Government's burden is greater . . . than with respect to an isolated disciplinary action" such as those considered in *Connick* and *Pickering*. *NTEU*, 513 U.S. at 468. The Commonwealth must show that the interests of plaintiffs and of society in the expression "are outweighed by [the] expression's necessary impact on the actual operation of the Government." *Id.* (internal quotation marks omitted). Whether judges happen to approve of this statute is not the question to be addressed under the *Pickering /NTEU* balance. We do not evaluate the enactment's desirability, only its constitutionality. Our view of the wisdom of a state provision "may not color our task of constitutional adjudication." *Clements v. Fashing*, 457 U.S. 957, 973 (1982).

While I fully agree with my dissenting colleagues that the speech at issue here is of public concern, I part company with their balancing under the second part of the *Connick* analysis. There is no question that the General Assembly addressed a real, not a fanciful, problem when it enacted this statute. The record is replete with examples of Internet web sites displaying graphic forms of sexual behavior. *See Urofsky v. Allen*, 995 F.Supp. 634, 639 (E.D.Va. 1998)(describing web site on university computer containing "graphic images of a nude woman in chains, a nude man with an erection, and a man and woman engaged in anal intercourse"). The posting of such material on web sites in state offices has led to workplace disruption and complaints that such sexually graphic matter contributes to a hostile work environment. While such abuses may be confined to a small minority of employees, Virginia has an undisputed and substantial interest in preventing misconduct of this sort. Sexual harassment via computer is as objectionable in the university setting as it is in any workplace. The Common-

wealth's interest as an employer in workplace efficiency is similarly beyond question. *See Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter.").

The state thus has every right to require its employees to spend their workday energies on the functions for which it is paying them. As the Supreme Court has stated, "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). While many university employees doubtless have genuine scholarly interests in the study of sexual phenomena, for others the examination of sexually explicit matter may bear no relationship to any academic enterprise. As the Commonwealth argues,"Publication of materials in the workplace that colleagues find offensive and demeaning plainly harms workplace morale and detracts from the efficiency of the workforce." Appellant's Br. at 35. In a more general but still important sense, the ubiquity of sexual imagery may diminish employee self-control and debase the entire workplace environment. My dissenting colleagues, however, give little weight to the Commonwealth's interest in the management of its own educational system and the running of its own workforce -- surely important interests under our federal scheme of government.

On plaintiffs' side of the balance, the Act, as noted, restricts access to material that potentially touches on matters of public concern. The recent revisions to the statute, however, have narrowed its scope considerably. As noted by the majority, the Act restricts the use of state owned or leased computer equipment to access any material "having sexually explicit content." Va. Code Ann. §2.1-805 (Michie Supp. 1999). As revised the statute defines "sexually ex-

plicit content" as: "content having as a dominant theme (i) any lascivious description of or (ii) any lascivious picture, photograph, drawing, motion picture film . . . or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, . . . sexual excitement, sexual conduct or sadomasochistic abuse, . . . coprophilia, urophilia, or fetishism." *Id.* §2.1-804. Although the statute still limits access to some non-obscene information, it now restricts a more limited range of material -- namely that which has as its dominant theme the lascivious depiction of nudity or sexual conduct.

Most importantly, through the waiver process the Commonwealth also accommodates the various interests at stake -- barring employee access to lascivious material generally, but providing a procedure that can be invoked whenever educational institutions determine that academic freedom so requires. The significant state interest here is thus balanced against a minimal intrusion on academic inquiry. Under the Act, the ultimate judgment on whether a requested waiver is for a bona fide research project resides in the system of university governance. The statute grants "agency heads" the authority to approve these waivers. *Id.* §2.1-805. As a practical matter, it appears from the record that Virginia's colleges and universities have delegated primary approval authority to officials such as deans and department heads.

The Commonwealth thus maintains academic freedom by reposing critical authority within the university itself. The Supreme Court has noted that academic freedom "thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985)(citations omitted). *See also* J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L.J. 251, 333

(1989)(defending institutional academic freedom based on "those research and humanistic values of a university that are unique to it"). Virginia's statute fits within this model of university self-governance. In using the term university self-governance I do not intend to downplay the significant role of state government and boards of trustees with respect to state systems of higher education, but to underscore the traditional role of deans, provosts, department heads, and faculty in making purely academic decisions.

It is this thread of institutional self-governance that ties our judgment today with *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998)(*en banc*). In *Boring* we held that "school administrative authorities had a legitimate pedagogical interest in the makeup of the curriculum of the school." *Id.* at 370. We reasoned that school boards must retain the "most basic authority to implement a uniform curriculum." *Id.* at 373. In upholding the right of a school board to make curriculum decisions, we upheld as well the state's legitimate interest in its secondary school governance structure. *See id.* at 368-69 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988), and *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989)). It is true that the governance structures of higher education and secondary education differ quite dramatically. The underlying approach of the court, however, should be the same. Where the state, as here, has worked within the traditional governance structure for educational institutions, the hand of the federal judiciary should ordinarily be stayed.

This is so for many reasons. It is well-established that federal courts have no business acting as surrogate university deans. Our "reluctance to trench on the prerogatives of state and local educational institutions," *Ewing*, 474 U.S. at 226, is grounded in powerful notions of federalism and a healthy awareness of limited judicial competence in univer-

sity administration. Federal courts are simply not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions." *Id.*

Were we asked to review *ex post* the judgments of these academic deans and department heads with respect to individual waiver requests, we would thus act with extreme deference. And for good reason. The discretionary choices made by provosts, deans, and faculties in the contexts of hiring, tenure, curriculum selection, grants, and salaries all potentially burden individual academic freedom to some extent, but courts have generally been unwilling to second-guess these necessarily sensitive and subjective academic judgments. *See Ewing*, 474 U.S. at 225 ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment"); *University of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments"). We should not presume *ex ante* that those same institutions will discharge their authority under this statute in an irrational or arbitrary fashion. I am thus not prepared to believe, as plaintiffs suggest, that a free academic institution will invade the freedoms of its own constituent members. In fact, the record reflects just the opposite -- several professors have received research waivers from their colleges or universities upon request. We have not been made aware of any examples of professors whose requests for exemptions were denied.

The fact that this statute governs use of the Internet should not change our approach to institutional self-governance. The Internet allows unparalleled access to information, thereby enhancing opportunities for freedom of expression and holding tremendous promise for virtually all types of research. But with this exponential growth of free-

dom comes the potential for abuse. Whereas formerly access to sexually explicit matter was somewhat limited, now a click of the mouse can invite obscene material into the middle of the working environment.

When the danger of abuse is great, however, so also is the danger of unwarranted repression. There will be the temptation to brand all public employees as miscreants because of the publicized misadventures of a few. This would be a mistake. "'The greater the importance of safeguarding the community . . . the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion . . . .'" *Keyishian*, 385 U.S. at 602 (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)). The Commonwealth has made the judgment that universities themselves are best equipped to balance the enormous promise of the Internet against the novel risks that may accompany it. Because the limited restrictions in this Act are administered within the traditional structure of university governance, I do not believe the Virginia statute contravenes the Constitution.

III.

My fine colleagues in the majority and in concurrence take issue with the above approach. They claim I believe "professors possess a special constitutional right," *ante* at 10 n.7, that I am "emphatic that a new constitutional right must be created," *ante* at 25 (Luttig, J., concurring), and that my "new-found right is reserved for professors alone," *ante* at 25. I would, however, create no new right of any sort. I would simply review the form, content, and context of the speech at issue -- something that the Supreme Court requires us to do in *Connick* and that the majority steadfastly refuses to do. The consequence of the majority's failure could not be more serious. Under the majority's view, even the gross-

est statutory restrictions on public employee speech will be evaluated by a simple calculus: if speech involves one's position as a public employee, it will enjoy no First Amendment protection whatsoever. My colleagues in the majority would thus permit any statutory restriction on academic speech and research, even one that baldly discriminated on the basis of social perspective or political point of view.

The Supreme Court has eschewed such a reductionist view of First Amendment rights. By refusing to undertake a proper public concern inquiry under the first step of *Connick* and *Pickering*, the majority ensures that all statutes targeting public academic speech are immune from balancing in the second step. Thus, a court need never even examine the competing state and public employee interests at stake. But the Supreme Court has stated that "[a]lthough such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Connick*, 461 U.S. at 150. By upholding this statute on the first step of *Connick/Pickering*, the majority surrenders this balance to a world of absolutes.

The majority and concurrence also characterize my approach as one of academic privilege. They contend I believe that "professors possess a special constitutional right of academic freedom," *ante* at 10 n.7, and that "the academy has a special contribution to make to society," *ante* at 25 (Luttig, J., concurring).

But the Supreme Court itself has emphasized that "academic freedom . . . is of transcendent value *to all of us* and *not merely to the teachers concerned.*" *Keyishian*, 385 U.S. at 603 (emphasis added). Indeed, "[t]he essentiality of freedom in the community of American universities is *almost self-evident.*" *Sweezy*, 354 U.S. at 250 (emphasis added). By its talk of special rights and privileges, I fear the majority somehow sees academic speech and democratic values as

inconsistent or at odds. With all respect, this need not be our view. I had always supposed that democracy and speech, including academic speech, assisted one another and that democracy functioned best when the channels of discourse were unfettered. It would be folly to forget this fundamental First Amendment premise in complex times when change of every sort confronts us. Those who have worked to acquire expertise within their given fields can aid popular representatives in reaching decisions and in shaping an informed response to rapid change. Democratic representatives may often choose to reject academic proposals, but rejection, not suppression, is the constitutionally tested course. In all events, for speech to function usefully and creatively it cannot be subject, as my colleagues in the majority would now have it, to the unexamined legislative will. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

The majority undertakes an extended discussion of academic speech, because public university professors are the plaintiffs before us. But the majority concludes, without any proper content-context inquiry, that such speech can never be of public concern. This dismissal is something we shall come to regret. I recognize that academic speech may well appear at times to be petty, "politically correct," or floating far beyond reality. But to see it as only that is to slip too easily into stereotype. Academic views on any subject are often varied, and it remains an abiding challenge to democratic leadership to understand what is misguided and naive about expert opinion and what is sound and wise. I offer no apology for believing, along with the Supreme Court in *Keyishian*, *Sweezy*, and *Rosenberger*, in the significant contribution made to society by our colleges and universities. That contribution, however, is but one of many

made from all walks of national life. Elected officials, labor leaders, industrialists, farmers, entrepreneurs, social workers, religious leaders, parents and teachers, the self-employed and the unemployed all make their contribution to the broad river of American speech, and I would not shut off any stream or tributary. The source from which speech flows should not mark it for judicial disfavor. I fear the court forgets that freedom of speech belongs to all Americans and that the threat to the expression of one sector of society will soon enough become a danger to the liberty of all.

MURNAGHAN, Circuit Judge, dissenting:

The majority's interpretation of the "public concern" doctrine makes the role of the speaker dispositive of the analysis. Specifically, the majority states that "critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.'" *See ante* at 8 (quoting *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)). The majority then rejects the plaintiffs' First Amendment claim because "[t]he speech at issue here . . . is clearly made in the employee's role as employee." *Id.* at 11. Because an analysis of *Connick v. Myers*, 461 U.S. 138 (1983), and its progeny reveals that the majority has adopted an unduly restrictive interpretation of the "public concern" doctrine, I respectfully dissent.

I.

A.

In *Connick*, the Supreme Court held that, as a threshold matter, if a public employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern," then a court does not balance the employer's interests with those of the employee. *Connick*, 461 U.S. at 146. The

Court broadly defined speech of public concern as speech "relating to any matter of political, social, or other concern to the community." *Id.* The Court also stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Nowhere in *Connick*, however, did the Court state that the role of the speaker, standing alone, would be dispositive of the public concern analysis.

Indeed, the facts of *Connick* belie this suggestion. Sheila Myers, an Assistant District Attorney, was discharged for distributing a questionnaire to the other attorneys in her office. In general, Myers' questionnaire asked her peers what they thought of the trustworthiness of certain attorneys in the office, the morale of the office, and the office's transfer policy. *See id.* at 141.

The Court held that these questions "do not fall under the rubric of matters of 'public concern,'" because they were "mere extensions of Myers' dispute over her transfer to another section of the criminal court." *Id.* at 148. Myers' questionnaire, however, also asked whether her fellow attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149. This question was in the same form and context as Myers' other questions -- an internal questionnaire distributed by an employee complaining about on-the-job conditions. The question thus was *speech by an employee in her role as an employee*. The Court nevertheless held that this question did "touch upon a matter of public concern." *Id.* The majority's formalistic focus on the "role of the speaker" in employee speech cases therefore runs directly contrary to Supreme Court precedent.

B.

Post-*Connick* decisions of this court also make it clear

that the role of the speaker does not control the public concern analysis. In *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987), the plaintiff, a high school teacher, circulated a petition to his students during class urging retention of the school's principal. *See id.* at 1077. The plaintiff undoubtedly was speaking in his role as an employee, as he was being paid by the State and using State facilities (classrooms) to carry out his employment duties (instructing students). The court nevertheless held that the plaintiff's speech was on a matter of public concern because it was a "matter in which the community . . . was vitally interested." *Id.* at 1080. The court also stressed that the speech was "of much wider importance than a mere 'private personnel grievance,'" that would not be of public concern. *Id.*

In *Piver*, the court relied on the "public concern" analysis set out by this court in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985). In *Berger*, the court interpreted the public concern doctrine as excluding from First Amendment protection only those matters of purely personal interest to the employee.

> *Pickering*, its antecedents, and its progeny -- particularly *Connick* -- make it plain that the "public concern" or "community interest" inquiry is better designed -- and more concerned -- to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee -- most typically, a private personnel grievance.

Id. at 998. Furthermore, the court stated that when analyzing whether speech is upon "any matter of political, social, or other concern to the community," *see Connick*, 461 U.S. at 146,"[t]he focus is . . . upon whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." *Berger*, 779 F.2d at 999.

Berger's broad approach to the public concern doctrine, focusing on the public importance of the speech, stands in stark contrast to the majority's singular focus on the role of the speaker -- regardless of the public import of the speaker's message. *See also Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988)("Although the Connick court did not elaborate on the relative weight to be accorded these three factors, this court has held that 'content, subject-matter, is always the central aspect'")(quoting *Jackson v. Blair*, 851 F.2d 714, 720 (4th Cir. 1988)).

C.

The majority justifies its singular focus on the role of the speaker by citing to language from *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"). In *NTEU*, the plaintiffs were executive branch employees challenging a law prohibiting federal employees from accepting any compensation for making speeches or writing articles, even when the speeches or articles did not have any connection to the employees' official duties. The Supreme Court held that the plaintiffs' speech was on a matter of public concern. *See id.* at 466. In doing so, the Court stated that "[t]hey seek compensation for their expressive activities in their capacity as citizens, not as Government employees. . . . With few exceptions, the content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the effi-

ciency of the offices in which they work." *Id.* at 465.

The majority's analysis of this language attempts to push *NTEU* where it did not go. The Court in *NTEU* stated that the plaintiffs' speech was on a matter of public concern in part because it was unrelated to the plaintiffs' employment; however, nowhere in *NTEU* did the Court state the converse: namely, that *if* the plaintiffs' speech was in their role as employees, then it automatically would not qualify as speech on a matter of public concern. Therefore, at best, *NTEU* suggests that the role of the speaker is a *factor* in a public concern analysis. But even a broad reading of *NTEU* does not suggest that the role of the speaker is the *only* factor to consider in a public concern analysis, despite the majority's claims to the contrary.

The majority also relies on our decision in *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998)(*en banc*). In *Boring*, the plaintiff, a high school teacher, was transferred by her principal for producing a student-acted play that addressed controversial topics such as lesbianism and teen pregnancy. The plaintiff alleged that the County violated her First Amendment rights by transferring her in retaliation for producing the play. *See id.* at 366-67.

A majority of this court framed the issue in *Boring* as only "whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play." *Id.* at 366. The majority held that the plaintiff's selection of the play was not a matter of public concern and was merely an "ordinary employment dispute." *Id.* at 368. As their framing of the issue shows, however, the majority's reasoning was not based on the fact that the plaintiff's production of the play was in her role as a school district employee. Rather, the majority answered the narrower question of

whether a teacher has a First Amendment right to participate in the makeup of the curriculum.

Judge Luttig's concurring opinion in *Boring* also illustrates that the majority's holding did not deal with the broader issue of whether speech by an employee in her role as an employee can qualify as speech on a matter of public concern. Judge Luttig stated that

> [the dissent] fails to recognize the elementary difference between teacher in-class speech which is curricular, and teacher in-class speech which is noncurricular, because it assumes that every word uttered by a teacher in a classroom is curriculum. *In the latter context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection.*

Id. at 373 (Luttig, J., concurring) (emphasis added). Presumably, Judge Luttig meant that teacher in-class noncurricular speech could be speech on a matter of public concern. As stated previously, however, a teacher's in-class speech is speech in her role as an employee, whether the speech is curricular or noncurricular. While students are under her care and supervision in the classroom, a teacher surely cannot be regarded as a "citizen" rather than an "employee" merely because she is discussing something other than trigonometry. Thus, *Boring* must rest on something other than the principle that speech by an employee in her role as an employee never qualifies as speech on a matter of public concern. *See Boring*, 136 F.3d at 379 (Motz, J., dissenting) ("Because the majority does not attempt to explicitly hold that the role in which an employee speaks is determinative [or overrule prior precedent], this reasoning must not be the basis for its conclusion that Boring's speech does not relate to a matter of public concern"). *Boring* therefore does not compel a finding that the plaintiffs' speech is not on a mat-

ter of public concern, merely because the plaintiffs' speech occurs in their role as employees.[1]

D.

Because speech by an employee in her role as an employee can qualify as speech on a matter of public concern, the issue thus becomes whether, in the instant case, the plaintiffs' speech is on a "matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. The plaintiffs' speech easily meets this test. The Supreme Court has stated that "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; *it is one of the vital problems of human interest and public concern.*" *Roth v. United States*, 354 U.S. 476, 487 (1957) (emphasis added).

The Act restricts over 101,000 state employees, including university professors, librarians, museum workers, and physicians and social workers at state hospitals, from researching, discussing, and writing about sexually explicit material. As the district court noted, "the Act's broad definition of 'sexually explicit' content would include research and debate on sexual themes in art, literature, history and the law, speech and research by medical and mental health professionals concerning sexual disease, sexual dysfunction, and sexually related mental disorders, and the routine exchange of information among social workers on sexual assault and child abuse." *Urofsky v. Allen*, 995 F.Supp. 634, 636 (E.D. Va. 1998). These topics undeniably touch on matters of public concern.

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[1] In any event, to the extent that *Boring* controls the public concern analysis in the instant case, and I do not agree that it does, I would revisit that holding. Judge Motz persuasively argued in her dissent in *Boring* why the majority's approach to public employees is at odds with *Connick* and its progeny.

The Commonwealth's recent revision to the Act limiting the definition of "sexually explicit content" to materials and descriptions that are "lascivious" does not change the analysis. Many works of public import could be classified as lascivious; in fact, many were specifically intended to have such an effect. For instance, the works of Toni Morrison and many themes found in Victorian poetry, including the material researched online by one of the plaintiffs, Professor Meyers, could be classified as lascivious. Also, the application of the Act to "lascivious" e-mail discussions by psychologists and social workers implicates topics of public import, because the public has an interest in unfettered discussions by State professionals concerning the abnormal sexual behaviors of their patients, in order to better diagnose and understand sexual deviancy.

Finally, the form of the plaintiffs' speech, Internet and e-mail communications, makes the speech of special public significance. In the information age, electronic communications may be the most important forum for accessing and discussing topics of concern to the community. This court should be wary of allowing the State to regulate this important medium of communication without requiring a legitimate justification for the regulation.

II.

Because the plaintiffs' speech is on a matter of public concern, we must balance the plaintiffs' interests in speaking on a matter of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Our analysis of this balancing test is guided by the Supreme Court's decision in *NTEU*, a case involving a statutory prohibition on certain types of employee speech.

As in *NTEU*, the Act at issue in the instant case does

not involve a post hoc analysis of one public employee's speech and the impact of that speech on the operation of government. Rather, we are forced to apply *Pickering* to the Commonwealth's "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *NTEU*, 513 U.S. at 467. The widespread impact of a prospective deterrent on employee speech "gives rise to far more serious concerns than could any single supervisory decision," because "unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens." *Id.* at 468.

The Commonwealth's burden in justifying its statutory restrictions on speech is therefore greater than with respect to an isolated disciplinary action. The Commonwealth must establish that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* (quoting *Pickering*, 391 U.S. at 571).

A. The Interests of the Plaintiffs and the Public

The Act restricts 101,000 state employees from researching, discussing, and writing about sexually explicit topics within their areas of expertise, thereby depriving the plaintiffs of their ability to speak on matters of public concern. It is difficult to measure the effect that the Act will have in stifling commentary and discourse on important topics in art, literature, psychology, and other disciplines; however, it is possible, for example, that seminal academic commentary on the works of Toni Morrison might be scrapped, and that research into sadomasochistic abuse in prisons might be set aside. The chilling of discourse on these topics and other issues adversely affects the material available to "potential audiences" of the plaintiffs' speech, restricting "the public's right to read and hear what the em-

ployees would otherwise have written and said." *NTEU*, 513 U.S. at 470. The Act thereby deprives the public of the "unique insights" that public employees can provide in their areas of specialization. *Sanjour v. Environmental Protection Agency*, 56 F.3d 85, 94 (D.C.Cir. 1995)(*en banc*).

B. The Commonwealth's Interests

The Commonwealth advances two interests in support of the Act's broad restrictions on employee speech: (1) maintaining operational efficiency in the workplace; and (2) preventing a sexually hostile work environment. While the Act may marginally serve the Commonwealth's asserted interests, the under and overinclusiveness of the Act is fatal to its constitutionality.

1. Underinclusiveness

The Commonwealth argues that the Act furthers its interest in workplace efficiency. The Commonwealth states that "[a] state employee who is reading sexually explicit material unrelated to his work is not doing the job he was hired to do." Appellant's Br. at 35. The Commonwealth's general interest in workplace efficiency, however, cannot be the basis for the Act's specific prohibition on accessing sexually explicit material on State computers.

First, employee efficiency is undermined by any activities that distract an employee from her job-related duties, not just unauthorized Internet use. Reading newspapers, listening to the radio, chatting with coworkers, or talking on the telephone with friends are examples of activities that keep an employee from performing her best on the job. The Commonwealth, however, does not attempt to regulate these activities through the Act, nor does it cite to any evidence that accessing sexually explicit material undermines workplace efficiency any more than these activities.

Second, the Act does not even cover all of the uses of

the Internet that undermine workplace efficiency. Employees may use State computers to send non-work related e-mail, as well as access news services, chat rooms, sports websites, and other material unrelated to their jobs. The Commonwealth has not explained, and cannot possibly explain, why employees who access sexually explicit material are any less "efficient" at their work than employees who check espn.com every twenty minutes during the NCAA tournament.

The Commonwealth next argues that the Act furthers its interest in preventing sexual harassment in the workplace. Again, the Act is not tailored to combat this ill in any material way. The Act targets only access to sexually explicit material on the Internet -- ignoring books, calendars, pictures, and other sexually explicit material that demeans women and helps create a sexually hostile work environment. A professor therefore would violate the Act by accessing the Internet to complete research on Victorian poetry, yet he would not violate the Act by leaving copies of Hustler Magazine lying around his office.

In addition, the Act only prohibits the accessing of sexually explicit material on *state-owned* computers; it does not impose a general ban on accessing any sexually explicit material on computers in the workplace. Thus, a state employee may use his own computer to access patently pornographic pictures around his students or colleagues without violating the Act. The Commonwealth does not provide any justification for why sexually explicit images are any less likely to create a hostile work environment if those images come from an employee's personal computer rather than from a state-owned computer.

2. Overinclusiveness

The Act is also impermissibly overinclusive. It prohibits research and commentary by state employees who access

this material to advance public discourse, awareness, treatment, and commentary on a variety of disciplines and social problems. The Act thus reaches the legitimate work-related uses of sexually explicit material, uses wholly unrelated to the narrower category of gratuitous sampling of pornographic material that the Act was intended to address. The Commonwealth appears to concede this point; however, the Commonwealth argues that the Act's prior approval process ensures that employees who have a legitimate need to access sexual explicit material will be able to do so.

The Act's prior approval provision allows state employees to access sexually explicit material "to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking." The Act's prior approval process, however, has no check on the discretionary authority of State agencies. The Supreme Court, in a related context, has found that such grants of unbridled discretion to government agents invites arbitrary enforcement. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Court held that

> when the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

Id. at 763; *see also Sanjour*, 56 F.3d at 97 ("Far from being the saving grace of this regulatory scheme -- as the government suggests -- the broad discretion that the regulations vest in the agency reinforces our belief that they are imper-

missible"). The potential for censorship by the State "justifies an additional thumb on the employees' side of [the] scales." *See Harman v. City of New York*, 140 F.3d 111, 120 (2d Cir. 1998)(invalidating agency's policy requiring prior approval for employee statements to the media) (quoting *Sanjour*, 56 F.3d at 97). The danger of arbitrary censorship is particularly relevant in the instant case, given the differing views on the merits of research and discussion into sexually-related topics.

The prior approval process does not save the Act even if we could assume that approvals would not be withheld arbitrarily, because the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757. Thus, even those employees who receive permission to speak will be inclined to engage in self-censorship, ultimately to the detriment of the public in the form of a banal and lifeless discourse on issues of public concern.

The under and overinclusiveness of the Act shows the "obvious lack of 'fit' between the government's purported interest and the sweep of its restrictions." *Sanjour*, 56 F.3d at 95. The lack of fit between the Act's broad restrictions and the interests the Act allegedly was intended to serve "cast[s] serious doubt," *see id.*, on the Commonwealth's claim that employees' access to sexually explicit material has a "necessary impact on the actual operation of the Government." *NTEU*, 513 U.S. at 468 (internal quotation omitted). Consequently, the Act does not survive the heightened scrutiny applied to statutory restrictions on employee speech.

III.

For the foregoing reasons, I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MELVIN I. UROFSKY; PAUL SMITH;
BRIAN J. DELANEY; DANA HELLER;
BERNARD H. LEVIN; TERRY L. MEYERS,
Plaintiffs-Appellees,

v.

JAMES S. GILMORE, III, in his official capacity as Governor of the Commonwealth of Virginia,
Defendant-Appellant.

No. 98-1481

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; THE AUTHORS GUILD; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge.

(CA-97-701-A)

Argued Oct. 29, 1998.
Decided Feb. 10, 1999.
Vacated on grant of rehearing en banc June 3, 1999.

Before WILKINS, HAMILTON, and LUTTIG, Circuit Judges.

Reversed by published opinion. Judge Wilkins wrote the majority opinion, in which Judge Luttig joined. Judge Hamilton wrote a concurring opinion.

OPINION

WILKINS, Circuit Judge:

Six professors employed by various public colleges and universities in Virginia brought this action[1] challenging the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state. *See* Va.Code Ann. §2.1-804 to -806 (Michie Supp.1998)(the Act). The district court granted summary judgment in favor of Plaintiffs, holding that the Act unconstitutionally infringed on state employees' First Amendment rights. *See Urofsky v. Allen*, 995 F.Supp. 634 (E.D. Va. 1998). We reverse.

I.

The central provision of the Act states:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act.

Va.Code Ann. §2.1-805.[2] Another section of the Act de-

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[1] The professors named George Allen, then Governor of Virginia, as defendant. Subsequently, James S. Gilmore, III was elected Governor and was substituted as a party. For ease of reference, we refer to Gilmore as "the Commonwealth."

[2] Other provisions of the Act provide additional relevant definitions:

(continued...)

fines "sexually explicit content" to include:

> (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in §18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in §18.2-390, coprophilia, urophilia, or fetishism.

Va.Code Ann. §2.1-804.[3]

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[2] (...continued)

> "Agency" means any agency, authority, board, department, division, commission, institution, institution of higher education, bureau, or like governmental entity of the Commonwealth, except the Department of State Police.
>
> "Information infrastructure" means telecommunications, cable, and computer networks and includes the Internet, the World Wide Web, Usenet, bulletin board systems, online systems, and telephone networks.

Va.Code Ann. §2.1-804 (emphasis omitted).

[3] Section 18.2-390 provides in pertinent part:

> (2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.
>
> (3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.
>
> (4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or

(continued...)

As its language makes plain, the Act prohibits state employees from accessing sexually explicit material on computers owned or leased by the Commonwealth. But, the Act does not prohibit all access by state employees to such materials, for a state agency head may give permission for a state employee to access such information on computers owned or leased by the Commonwealth if the agency head deems such access to be required in connection with a bona fide research project or other undertaking. Further, state employees remain free to access sexually explicit materials from their personal or other computers. Thus, the Act prohibits state employees from accessing sexually explicit materials only when the employees are using computers that are owned or leased by the Commonwealth and permission to access the material has not been given by the appropriate agency head.

Plaintiffs maintain that this restriction -- the denial of access to sexually explicit materials on computers owned by or leased to the Commonwealth when permission for such access has not been given by the appropriate department head -- is violative of their First Amendment right to freedom of expression. Plaintiffs do not assert that they possess a First Amendment right to access this information on state-owned or leased computers for their personal use; rather, Plaintiffs confine their challenge to the denial of access to sexually explicit material for work-related

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[3] (...continued)
arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

Va.Code Ann. §18.2-390(2)-(5)(Michie 1996)(emphasis omitted).

purposes.[4]

II.

It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968). Nevertheless, the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994)(plurality)(recognizing "that the government as employer . . . has far broader powers than does the government as sovereign"); *Pickering*, 391 U.S. at 568 (explaining "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"). A determination of whether a restriction imposed on a public employee's speech is violative of the First Amendment requires "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern

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[4] Plaintiffs asserted that the Act violated their First Amendment rights to free speech by hindering their ability to perform their employment duties, e.g., teaching and researching. The lead plaintiff, Melvin I. Urofsky, alleged that he had declined to assign an online research project on indecency law because he feared he would be unable to verify his students' work without violating the Act. Another plaintiff, Terry L. Meyers, contended that he is affected by the Act because his ability to access Virginia's database to research sexually explicit poetry in connection with his study of Victorian poets is restricted by the policy. Plaintiff Paul Smith's website has been censored as a result of the Act. And, plaintiffs Dana Heller, Bernard H. Levin, and Brian J. Delaney maintained that they were hesitant to continue their Internet research of various aspects of human sexuality.

and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 142 (alteration in original)(quoting *Pickering*, 391 U.S. at 568). This balancing involves an inquiry first into whether the speech at issue touches upon a matter of public concern, and, if so, whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace. *See Pickering*, 391 U.S. at 568; *see also Connick*, 461 U.S. at 146 (noting that if a public employee's speech cannot be characterized "as relating to any matter of political, social, or other concern to the community," the constitutional inquiry comes to an end).

Thus, our threshold inquiry is whether the Act regulates speech[5] by employees of the Commonwealth in their capacity as citizens upon matters of public concern. *See Connick*, 461 U.S. at 146.[6] If a public employee's speech does not

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[5] There is no dispute concerning whether "speech" is at issue here. First Amendment protection of expression encompasses the right to access information. *See Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

[6] The Commonwealth initially maintains that the speech regulated by the Act is not entitled to First Amendment protection because the Act regulates only obscene material. *See Miller v. California*, 413 U.S. 15 (1973)(holding that obscene material is not entitled to First Amendment protection). We disagree. Although the definition of "sexually explicit content" in the Act includes some obscene speech, *i.e.*, speech that "lacks serious literary, artistic, political, or scientific value;" that is "patently offensive;" and that appeals primarily to a "prurient interest," *id.* at 24, the Act regulates additional speech as well. For example, the Act is sufficiently broad to govern research and debate on sexual themes in art, literature, history, and the law; speech and research by medical and mental health professionals concerning sexual disease, sexual dysfunction, and sexually related mental disorders; and the routine exchange

(continued...)

touch upon a matter of public concern, the Commonwealth, as employer, may regulate it without infringing any First Amendment protection. *See Holland v. Rimmer*, 25 F.3d 1251, 1255 n.11 (4th Cir.1994).[7] Whether speech touches upon a matter of public concern is a question of law for the court and, accordingly, we review the matter de novo. *See Connick*, 461 U.S. at 147-48 & n.7; *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 192 (4th Cir.1994); *Holland*, 25 F.3d at 1255.

Speech involves a matter of public concern when it affects a social, political, or other interest of a community. *See Connick*, 461 U.S. at 146. And, to determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record. *See id.* at 147-48. An inquiry into whether a matter is of public concern does not involve a determination of how interesting or important the subject of an employee's speech is. *See Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986). Further, the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and an employee may speak in his capacity as an employee away from the workplace. *Compare Rankin v. McPherson*, 483 U.S. 378, 388-92 (1987)(holding public employee's discharge was violative of First Amendment

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[6] (...continued)
of information among social workers on sexual assault and child abuse. Accordingly, the Act regulates more than obscene speech.

[7] When a public employee's speech does not touch upon a matter of public concern, that speech is not "totally beyond the protection of the First Amendment," but "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a [restriction on a public employee's speech] taken by a public agency." *Connick*, 461 U.S. at 147.

when based on comment by employee on a matter of public concern made at work), *with DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir.1995)(recognizing that speech by a public employee outside the workplace was made in the employee's official capacity). Critical to a determination of whether speech touches upon a matter of public concern is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." *Terrell*, 792 F.2d at 1362; *see Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir.)(*en banc*)(holding that the discharge of a high school drama teacher as a result of her selection of a high school play was not violative of the First Amendment because the choice of the play did not involve a matter of public concern since the choice was made by the teacher in her capacity as a teacher in a matter dealing with curriculum), *cert. denied*, 119 S.Ct. 47 (1998); *DiMeglio*, 45 F.3d at 805 (noting that "the Court ha[s] distinguished between speaking as a citizen and as an employee, and ha[s] focused on speech as a citizen as that for which constitutional protection is afforded"); *cf. Rust v. Sullivan*, 500 U.S. 173, 198-99, (1991)(rejecting argument that the First Amendment rights of the staff of clinics accepting federal funding were violated by regulations prohibiting abortion counseling by clinics receiving federal funds, stating that "[t]he employees' freedom of expression is limited during the time that they actually work for the project [,] but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority").

The challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees. It cannot be doubted that in order to pursue its legitimate goals effectively, the Commonwealth must retain the ability to control the manner in which its employees discharge their duties

and to direct its employees to undertake the responsibilities of their positions in a specified way. *Cf. Waters*, 511 U.S. at 675 (plurality)(explaining that restrictions on speech may be necessary when "the government is employing someone for the very purpose of effectively achieving its goals"); *id.* at 672 (noting that "even many of the most fundamental maxims of . . . First Amendment jurisprudence cannot reasonably be applied to speech by government employees"); *Connick*, 461 U.S. at 143 (acknowledging that "government offices could not function if every employment decision became a constitutional matter"). The essence of Plaintiffs' claim is that they are entitled to access sexually explicit material in their capacity as state employees. Because Plaintiffs assert only an infringement on the manner in which they perform their work as state employees, they cannot demonstrate that the speech to which they claim entitlement would be made in their capacity as citizens speaking on matters of public concern.[8]

III.

We reject the conclusion of the district court that Va. Code Ann. §§2.1-804 to -806, restricting state employees from accessing sexually explicit material on computers that are owned or leased by the Commonwealth unless given permission to do so, infringes upon the First Amendment rights of state employees. The Act regulates the speech of

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[8] Our conclusion that the Act does not infringe on protected speech is dispositive of Plaintiffs' claim that the Act is overbroad. *See Boos v. Barry*, 485 U.S. 312, 331 (1988)(recognizing that a regulation that "does not reach a substantial amount of constitutionally protected" speech is not overbroad). Further, Plaintiffs' claim that the Act violates their First Amendment right to academic freedom is foreclosed by our en banc decision in *Boring*. *See Boring*, 136 F.3d at 368-69. Finally, the Act is not unconstitutionally vague because it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

individuals speaking in their capacity as Commonwealth employees, not as citizens, and thus the Act does not touch upon a matter of public concern. Consequently, the speech may be restricted consistent with the First Amendment.

REVERSED.

HAMILTON, Circuit Judge, concurring:

The Plaintiffs claim that they have a First Amendment right to access and disseminate sexually explicit materials on computers that are owned and operated by the Commonwealth. The Plaintiffs' access to, and dissemination of, sexually explicit materials is necessary for them to perform their duties as educators; but, nevertheless, the Plaintiffs' access to, and dissemination of, sexually explicit materials is accomplished in their capacities as state employees. Because the Plaintiffs' access to, and dissemination of, sexually explicit materials is accomplished in their capacities as state employees, the court today correctly concludes that the speech in this case, under the implicit holding of our *en banc* decision in *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.)(*en banc*), *cert. denied*, 119 S.Ct. 47 (1998), is employee speech, and, therefore, not entitled to First Amendment protection.

I joined Judge Motz's dissent in *Boring* which persuasively explains why a public employee should enjoy far greater First Amendment protection than that contemplated by *Boring*. *See id.* at 378-80. Left to my own devices, I would hold that the Plaintiffs' speech in this case is entitled to some measure of First Amendment protection, thus triggering application of the *Connick/Pickering* balancing test. However, being bound by the *en banc* court's decision in *Boring*, I concur in the court's opinion.

Finally, I write separately to make clear that we leave

unanswered the question of whether a governmental employee who seeks to access and disseminate sexually explicit materials rising to the level of matters of public concern, not in his or her role as a governmental employee, but rather as a private citizen, is entitled to some measure of First Amendment protection. The facts of this case leave that issue for another day.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division.

MELVIN I. UROFSKY, et al.,
Plaintiffs,

v. Civil Action No. 97-701-A

George ALLEN, Governor of the Commonwealth of Virginia,
Defendant.

Feb. 26, 1998.

MEMORANDUM OPINION

BRINKEMA, District Judge.

Before the Court are the parties' cross-motions for summary judgment, in a case concerning the constitutionality of Va. Code §2.1-804 *et seq.*, entitled "Restrictions on State Employee Access to Information Infrastructure" ("the Act"), which restricts the ability of state employees to access sexually explicit material on state-owned or leased computers.

I.

The plaintiffs are professors at various Virginia state colleges and universities, who allege that the Act unconstitutionally interferes with their research and teaching. For example, plaintiff Urofsky has been reluctant to assign students online research assignments on "indecency" law because of the Act; Smith's website containing materials on gender roles and sexuality has been censored as a result of the Act; Meyers is concerned about his ability to access the Commonwealth's own database of sexually explicit poetry to continue his studies on the "fleshy school" of Victorian poets; Heller has stopped using the Internet to continue her

research on lesbian and gay studies; and Levin and Delaney are reluctant to use the Internet to continue their psychological research on human sexual experience. Plaintiffs contend that the Act, which became effective on July 1, 1996, violates their First Amendment right to free speech, and ask this Court to grant them summary judgment invalidating the Act. Defendant argues in response that the Act is a legitimate limitation of the speech of government employees, and asks the Court for summary judgment affirming the Act's validity.

Section 2.1-805 of the Act provides that:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act.

Section 2.1-804 defines "sexually explicit" content broadly to include:

> (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in §18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in §18.2-390, coprophilia, urophilia, or fetishism.[1]

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[1] The same section also contains the following definitions:

(continued...)

Section 18.2-390 of Virginia's Criminal Code provides further definitions for the Act:

> "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.
>
> "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
>
> "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, public area, buttocks, or, if such be female, breast.
>
> "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a

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[1] (...continued)

> "Agency" means any agency, authority, board, department, division, commission, institution, institution of higher education, bureau, or like governmental entity of the Commonwealth, except the Department of State Police.
>
> "Information Infrastructure" means telecommunications, cable, and computer networks and includes the Internet, the World Wide Web, Usenet, bulletin board systems, on-line systems, and telephone networks.

This latter definition might actually reach the standard office telephone if those phones are part of a computerized telecommunication system.

mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

Although the Act restricts the ability of state employees to research, speak on, or receive information concerning sexually explicit topics via state computers, it does not completely prohibit such activities. Instead, the Act permits an employee to access sexually explicit material only after receiving written approval from the appropriate agency head who may grant such approval only if the proposed use is "required" in connection with a "bona fide" research project or undertaking. *See* Va.Code §2.1-805.

II.

The Applicable Standard of Review for Speech by Government Employees

When government employees speak on matters of public concern their speech is entitled to First Amendment protection under the standard set forth in *Pickering v. Board of Education*. *See* 391 U.S. 563 (1968); *see also Connick v. Myers*, 461 U.S. 138, 147-49 (1983)(speech of public employees on matters of merely private concern such as personal employment grievances is unprotected). Under the *Pickering* standard, the Court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. This balancing test applies equally to speech within the workplace as it does to speech outside it. *See Rankin v. McPherson*, 483 U.S. 378, 383 (1987)(*Pickering* balancing applied to employee's on-the-job statements).

The Act's broad definition of "sexually explicit" content obviously includes obscene speech, that is, speech which

lacks "serious literary, artistic, political, or scientific value;" that is "patently offensive;" and appeals primarily to a "prurient interest." *See Miller v. California*, 413 U.S. 15, 24 (1973). Such speech does not enjoy First Amendment protection. However, the Act also applies to sexually explicit speech that is normally protected. For example, the Act's broad definition of "sexually explicit" content would include research and debate on sexual themes in art, literature, history and the law, speech and research by medical and mental health professionals concerning sexual disease, sexual dysfunction, and sexually related mental disorders,[2] and the routine exchange of information among social workers on sexual assault and child abuse. Much of this information can be expected to be of benefit to the public. Indeed, the Supreme Court has expressly stated that sex is "one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957). As such, the speech of state employees on sexually explicit topics includes speech on matters of public concern entitled to First Amendment protection under the *Pickering* balancing test.

The Commonwealth argues that "state employee computer use is not protected speech under the First Amendment because the employees are acting in their capacities as government employees, not public citizens." (Memo at 8). To support this position, the Commonwealth relies on *DiMeglio v. Haines*, 45 F.3d 790, 815 (4th Cir. 1995), and *Boring v. Buncombe County Board of Education*, No. 95-2593, 1998 WL 57559 (4th Cir. Feb. 13, 1998)(*en banc*). Both cases and *Pickering* focused on whether after-the-fact discipline of

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[2] Indeed, the Act specifically refers to fetishism, coprophilia and urophilia, all of which are recognized as sexual disorders by the American Psychological Association in its *Diagnostic and Statistical Manual, Fourth Edition*. *See* Va.Code §2.1-804; Plaintiff's Statement of Undisputed Facts ("S.U.F.") ¶84.

a public employee by a government employer violated the employee's First Amendment free speech rights. They did not address, as we must here, a broad statute which prospectively addresses the speech of over 100,000 public employees. Indeed, as the *DiMeglio* court recognized, the relevant inquiry as to whether a public employee's speech on a matter of public concern is protected "requires a 'particularized balancing' that is subtle, difficult to apply, and not yet well defined." *DiMeglio*, 45 F.3d at 806 (citing *Connick*, 461 U.S. at 150).

Because the Act before us establishes a prospective deterrent "to a broad category of expression by a massive number of potential speakers," *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 467 (1995) (hereinafter "*NTEU*"), the government's justification for the restriction must be correspondingly higher. *Id.* at 468 (such a restriction "gives rise to far more serious concerns than could any single supervisory decision"). In addition, the Supreme Court has recognized a difference between "adverse action taken in response to actual speech," and an up-front restriction like that found in the Act, which "chills potential speech before it happens." *Id.* (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)). This feature of the Act also necessarily increases the government's burden. Moreover, prospective restrictions on public employee speech impact heavily "on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 470. This lost public benefit is particularly great where a government employee speaks on matters of which she has specialized knowledge. *See Sanjour v. EPA*, 56 F.3d 85, 94 (D.C.Cir. 1995)(*en banc*)("[A]s numerous courts and commentators have observed, government employees are in a position to offer the public unique insights into the workings of the government generally and their areas of specialization in particular."); *see also Waters v. Churchill*, 511 U.S. 661,

674 (1994). Accordingly, the public's interest in receiving the speech of government employees must also be weighed against the government's interest in a challenged restriction. To address these concerns, the Supreme Court expanded the *Pickering* test and held in *NTEU* that when the government broadly restricts public employee speech, it has the burden of establishing that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571).[3]

In the instant case, application of the *Pickering/NTEU* test is further complicated by the Act's discrimination against sexually explicit content. The Supreme Court has made it clear on numerous occasions that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *see also Turner Broadcasting v. F.C.C.*, 512 U.S. 622, 641-43 (1994)("*Turner I*"). Underlying this principle is the recognition that "content-based burdens on speech raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). To justify such restrictions, the government must demonstrate a compelling interest, and the restrictions must be narrowly tailored to meet that objective.

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[3] In *NTEU*, government employees challenged a provision of the Ethics in Government Act which prohibited them from receiving honoraria in connection with unofficial speaking engagements. *Id.* at 454. Applying the test set forth above, the Court concluded that the restriction imposed an unconstitutional burden on the free speech rights of federal employees. *Id.*; *see also Sanjour*, 56 F.3d at 85.

See Simon & Schuster, 502 U.S. at 118.[4] Despite this long line of well-established First Amendment precedent, defendant argues that the content-discriminatory nature of the Act does not increase its burden under the *Pickering/NTEU* balance. In support, defendant cites *Board of County Comm'rs v. Umbehr*, 116 S.Ct. 2342, 2348 (1996). *Umbehr*, like *Pickering*, involved a single adverse employment action taken by the government against an individual on account of his speech. It did not involve a content-based prior restraint affecting thousands of government employees. Consequently, the application of *Umbehr* to the present action is limited. Nevertheless, we recognize the general principle underlying *Umbehr* that the government may undertake actions as an employer that are forbidden to it as sovereign. *See id.* at 2349.[5] Accordingly, rather than requiring the government to satisfy strict scrutiny review, as would be appropriate were the government acting solely as sovereign, we instead treat the Act's content discrimination as yet another factor to be considered in applying the *Pickering/NTEU* balancing test.

The Interest of State Employees and Potential Audiences

At stake is the ability of more than 101,000 public em-

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[4] Indeed, Justice Kennedy has argued persuasively that a regulation that discriminates on the basis of content is *per se* invalid and that "[n]o further inquiry is necessary to reject the State's argument that [such a] statute should be upheld." *Id.* at 124 (Kennedy, J., concurring).

[5] In *Umbehr*, a government contractor argued that the County was required to satisfy strict scrutiny review when it retaliated against him because he publicly criticized County officials. The Court disagreed, holding that plaintiff's status as an independent contractor did not exempt him from the *Pickering/NTEU* balancing test applied to government employees because in both cases the government acts as a contractor for services rather than as sovereign. *See id.*

ployees at all levels of state government to read, research, and discuss sexually explicit topics within their areas of expertise. This includes inquiry and debate by academics in the fields of art, literature, medicine, psychology, anthropology, and law, and the exchange of sexually explicit information and opinions by employees in Virginia's Departments of Corrections, Social Services, Juvenile Justice, and Mental Health, and the Office of the Commonwealth's Attorney General. Indeed, in the instant case, the Commonwealth's own attorneys were required to obtain written agency approval to make use of the Internet material they have identified as "sexually explicit" before they could submit it with their pleadings. (Plaintiff's Ex. 34).

Equally at stake is the right of the public to receive and benefit from the speech of state employees on matters within their areas of expertise. *See NTEU,* 513 U.S. at 470; *Sanjour*, 56 F.3d at 94. As the Supreme Court explains, "Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Board of Edu. v. Pico*, 457 U.S. 853, 866 (1982)(quoting *First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765, 783 (1978)). Contrary to defendant's assertion, the interests of potential audiences are an essential part of the *Pickering/ NTEU* balance. *See NTEU*, 513 U.S. at 468. Here, as in *NTEU*, the statute at issue impacts heavily "on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 470. As noted above, "public employees, by virtue of their expertise and experience, are often among the citizens who are the best informed . . . their opinions are thus especially valuable to the public." Developments in the Law -- Public Employment, 97 Harv. L.Rev. 1611, 1768 (1984). Moreover, by targeting the use of computers, the Act necessarily restricts use of the

Internet, arguably the most powerful tool for sharing information ever developed. *See generally Reno v. ACLU*, 117 S.Ct. 2329 (1997)(describing the uses and potential of the Internet, and noting with approval the observation of the district court that "[i]t is no exaggeration to conclude that the content of the Internet is as diverse as human thought"). In doing so, the Act increases the burden both on the research and speech of state employees and on the public's ability to benefit from that research and speech. Given the public and employee interests described above, we agree that "[d]epriving . . . the general populace of government employees' novel and valuable perspective . . . require[s] a serious and carefully considered justification." *Sanjour*, 56 F.3d at 94.

The Commonwealth's Asserted Interests in Workplace Efficiency and Avoiding Hostile Work Environment Claims

Under the *Pickering/NTEU* standard, the government must demonstrate not only that the harms it asserts are "real, not merely conjectural," but also that the statute used to address them is a "reasonable response to the threat" which will alleviate the harms "in a direct and material way." *NTEU*, 513 U.S. at 474-75 (quoting *Turner I*, 512 U.S. at 624). The *Sanjour* court has interpreted the "reasonable response" requirement to mean that "[i]n performing the Pickering balance, . . . the courts must consider whether the challenged statute or regulation is tailored to address the harm that the government allegedly aims to protect." *Sanjour*, 56 F.3d at 97.

The Commonwealth asserts that the Act's restriction of sexually explicit speech is necessary in order to: (1) maintain operational efficiency in the workplace; and (2) prevent the creation of a sexually hostile work environment. As evidence that sexually explicit speech disrupts workplace

functions, the Commonwealth describes five incidents in which employees used state computers to view or display sexual images unrelated to their work. *See* Def. Exs. 3-7. In some of these incidents, employees or students exposed to sexually explicit material were offended and complained to supervisors or departmental officials. For example, a Library of Virginia employee who observed a co-worker viewing "homosexual pornography" was offended, and complained to a supervisor. (Def.Ex. 3). In another example, a female student observed an image of a nude woman on a professor's computer when she approached him with class-related questions; the student complained to her advisor and attempted to drop the class. (Def.Ex. 6). One student complained to a departmental official that a visiting professor was storing child pornography on a state computer; the professor was asked to resign immediately and did so. The university referred the matter to the appropriate prosecutor's office. (Def.Ex. 7). In another incident, the Commonwealth had to remove sexually explicit material from several state computers. (Def.Ex. 5).

As evidence that sexually explicit speech is likely to result in a hostile work environment, defendant points to a website maintained by Paul Smith, one of the plaintiffs in this action. The website is maintained on a state computer at a state university, and contains, among other materials, graphic images of a nude woman in chains, a nude man with an erection, and a man and woman engaged in anal intercourse. *See* Def. Ex. 1, attachment 1. Smith contends that the images were intended as part of a discussion about censorship, pornography and capitalist control of the Internet. However, several students and at least one faculty member visited the site, were offended by the pictures they saw there, and complained to John O'Connor, vice-provost for information technology at the university. *See* Def. Ex. 1 at 118-132. Angry discussion concerning the images was

"all up and down [the] hall" and had become a "big deal" by the end of the week. *See* Pl. Ex. 1 at 137-38, 178-79. In response to these complaints, O'Connor initially blocked access to several images, but later restored some of them. *See id.* at 123-26, 170-73.

We are not unsympathetic with the government's concern about the potential of such incidents to impair workplace efficiency. Employees viewing sexual images unrelated to their work are neglecting the duties they were hired to perform, causing a loss of productivity. Such images may also distract and offend co-workers. Finally, the Commonwealth must spend time and money dealing with complaints, disciplining employees, and removing frivolous materials from state computer equipment. Certainly, the government is entitled to guard the productivity of its employees against distraction. Likewise, the Commonwealth has a right, as well as a legal duty, to avoid the creation of a hostile work environment.

Ultimately, however, the strength of the government's asserted interests must be evaluated in terms of the statute it has crafted to address them. In the instant case, we find that the Act is both fatally overinclusive and underinclusive; and that this "obvious lack of 'fit' between the government's purported interest and the sweep of its restrictions" casts "serious doubt" on the government's asserted need for the statute. *See Sanjour*, 56 F.3d at 95; *see also Carey v. Brown*, 447 U.S. 455, 465 (1980)(a statute's over- and under-inclusiveness "undermine [the] claim that the prohibition . . . can be justified by reference to the State's interest"). Moreover, the harms asserted by the Commonwealth appear to be adequately addressed by existing content-neutral enforcement mechanisms. This further undercuts the Commonwealth's asserted justifications for the Act. *See R.A.V.*, 505 U.S. at 395 ("The existence of adequate content-neutral alternatives thus 'undercut[s] significantly'

any defense of such a statute")(quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988)). We discuss each of these findings in turn.

Underinclusiveness

The Commonwealth claims that the Act is needed to avoid workplace disruption and ensure employee efficiency. However, the Act targets only those distractions that are sexual in nature. Thus, the Act ignores the limitless variety of disruptive computer activities unrelated to viewing sexually explicit material, including, but not limited to, accessing online video games, news services, stock quotes and financial information, chat rooms, and shopping sites. Nor does the Act address the sending and receiving of e-mail on non-work-related topics. Strangely, Virginia state police are exempt from the Act. *See* Va.Code. Ann. §2.1-804. Defendant does not explain why state police are less susceptible to the temptations posed by sexually explicit material than doctors, social workers, academics, lawyers and other state employees who are subject to the Act.

The Commonwealth also claims that the Act is needed to avoid hostile workplace claims. However, the Act fails to address racially, ethnically or religiously offensive material, which would also give rise to such claims. *See* 42 U.S.C. §2000e-2(a)(1). Nor does the Act effectively guard against gender-based hostile workplace claims, because it does not reach material which is blatantly hostile and derogatory toward women, but lacks sexually explicit content. Furthermore, the Act targets only a single medium, electronic communication, ignoring printed displays of material such as "pin up" calendars of nudes which might create a sexually hostile environment. Thus, an employee forbidden from accessing explicit sexual scenes on his office computer might leave a book open displaying the exact same images without running afoul of the Act. Indeed, the case law re-

lied upon by the Commonwealth to show that the display of sexually explicit material can create a hostile work environment involves verbal and printed, not electronic, displays of sexual material. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir.1997); *Winsor v. Hinckley Dodge*, 79 F.3d 996 (10th Cir.1996).

Overinclusiveness

The Act is also overinclusive. By categorically restricting all computer use involving sexually explicit material, the Act interferes with countless work-related endeavors by state employees dealing with sexuality and the human body. As discussed above, some of these are academic in nature, and deal with sexual themes in art, literature, history, and philosophy. Others are more practical and concern topics such as prison rape, pedophilia, AIDS and other sexually transmitted diseases. *See generally* Plaintiffs' Statement of Undisputed Facts ("S.U.F.") ¶99-126 (work-related sexually explicit topics at risk under the Act). In so doing, the Act not only burdens those employees who wish to speak or educate the public on topics within their areas of expertise, it also inhibits such employees from obtaining the information needed to inform their views.

The Act also imposes restrictions on speech beyond what is necessary to prevent sexual harassment or a sexually hostile work environment. Indeed, the Act prevents speech on matters unrelated to sex at all. For example, the Act prohibits depictions of sadomasochistic abuse, which the Act defines as "actual or explicitly simulated . . . torture by or upon a person who is nude or clad in undergarments." *See* Va.Code Ann. §2.1-805; 18.2-390. Thus, a history professor's research on Argentina's Dirty War or human rights abuses in Guatemala might be banned under the Act, despite the fact that the speech was completely unrelated to sex or gender. Furthermore, existing case law recognizes that the

mere presence of sexually explicit materials in the workplace does not foster a hostile work environment or otherwise violate gender discrimination laws.[6] *See Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 66-69 (1986); *Dwyer v. Smith*, 867 F.2d 184, 188-89 (4th Cir. 1989). Ironically, a significant portion of the sexually explicit material restricted by the Act is available in the Commonwealth's own Virtual Library of Virginia ("VIVA"). *See* Plaintiffs' S.U.F. ¶114. This collection of databases was created to assist state professors and researchers in the performance of their scholarly duties. *See* Hurt Decl. ¶8; Def. Ex. 1 (O'Connor Dep.) at 29-30; Plaintiffs' S.U.F. ¶28. Similarly, many state agencies maintain work-related databases containing sexually explicit material. *See* Plaintiffs' S.U.F. ¶112-13, 122-26. Moreover, students attending state colleges and universities may freely access the very same materials for which their professors must gain written permission because the Act does not apply to students. At least one of the plaintiffs claims he has removed assignments from his syllabus because he would be unable to confirm the Internet research of his students on sexually explicit

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[6] Likewise, the actions of Paul Smith, on which defendant heavily relies, do not present a viable hostile work environment claim. The Commonwealth has cited no cases to support its contention that a female employee's voluntary decision to access sexual material not on display in the workplace can be construed as sexual hostility directed against that employee. Indeed, the cases cited uniformly hold that sexually hostile speech must be part of the work environment to be actionable and must rise to a level sufficiently severe and pervasive as to create an abusive workplace. *See Caviness*, 105 F.3d at 1221; *Winsor*, 79 F.3d at 1000; *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)(discussing elements of hostile work environment claims); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (same). It is perhaps for this reason that no claim of sexual harassment or a hostile work environment has been filed in connection with Smith's website, which apparently continues to offer images defendant considers "sexually explicit."

topics. *See* Plaintiffs' S.U.F. ¶36 (Urofsky, plaintiff, removed assignments on the recently approved Communications Decency Act); *see also* Plaintiffs' S.U.F. ¶94-95 (Act may prevent Delaney, also a plaintiff, from confirming a student's research on Nabokov's *Lolita*).

Prior Approval

In arguing for the constitutionality of the Act, the Commonwealth states that the Act imposes only a minimal burden on present and future employees, because it "authorizes state employees to access sexually explicit materials that are work related," subject to the Act's approval process. (Memo at 11). To support that argument, the Commonwealth states that the standard for approval is that the sexually explicit information be work related. "Thus, under the Act, the agency head rather than the employee decides whether the project is *work related.* If the project is *work related*, the agency head approves it. The Act does nothing more than require that the employees' use be work related." *Id.* (emphasis added).

In fact, the Commonwealth has misread the Act, which speaks not in terms of the more general concept of "work related" but rather uses the more restrictive word "required." Thus, access of sexually explicit material is permitted only "to the extent *required* in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking." (emphasis added). Under a literal reading of this Act, approval of access to sexually explicit material that is work related, but not required, could be denied. To further complicate matters, the Act qualifies "agency-approved research projects and other agency approved undertakings" by adding the word "bona fide," thereby leaving open the possibility that there could be agency-approved projects that were somehow not bona fide. Moreover, Agency approvals of sexually explicit speech "shall be available to the public

under the provisions of the Virginia Freedom of Information Act," a not-so-veiled threat to the agency head who approves such speech. Lastly, the Act does not provide for appeals of agency decisions. Thus, if an agency head were to turn down a request, the employee would appear to have no recourse and potentially both the employee and the public would be denied the benefit of that access. Given the Act's strict qualifications and the absence of clear criteria under which a department head may determine what is "required" and "bona fide," the Act places unbridled discretion in the hands of state administrators. The Supreme Court has held that such grants of unfettered discretion can be expected to invite arbitrary enforcement and to chill the free exercise of speech rights. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988); *see also Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)("It is not merely the sporadic abuse of power by the censor but the pervasive threat in its very existence that constitutes the danger to freedom of discussion"). Indeed, the Act's requirement that approval decisions regarding sexually explicit materials be made public under Virginia's Freedom of Information Act suggests that this was in fact the purpose of the approval provision.

Moreover, implementation of the approval process has proven problematic. On the one hand, the paperwork associated with approval requests appears to be minimal, and approvals, when granted, are granted swiftly, some within twenty-four hours. *See* Def. Ex. 10 (professor's approval request for project on the nature of censorship granted within twenty-four hours); Pl.Ex. 36 (two-sentence request for access to sexually explicit ancient art granted within forty-eight hours). Since the Act became law in 1996, however, only three of Virginia's thirty-nine institutions of higher learning have received requests for approvals under

the Act.[7] Similarly, only three state agencies, the Department of Education, the Virginia Museum of Fine Arts, and the Office of the Attorney General, appear to have received approval requests under the Act. *See* Plaintiffs' S.U.F. ¶147. Excluded from this list are the Department of Corrections, the Department of Health, the Department of Juvenile Justice, the Department of Social Services, the Department of Mental Health, Mental Retardation and Substance Abuse Services, the Library of Virginia, and other state agencies whose employees presumably make frequent use of sexually explicit information. *See id.*; Pl.Ex. 14. Furthermore, the University of Virginia, one of the few academic institutions to have processed approval requests, has granted some of its departments blanket approvals. *See* Plaintiff's S.U.F. ¶149-54. For example, the University has granted 8,300 employees at the University's Health Sciences Center advance permission to access "sexually explicit material in connection with or necessary to the duties of a faculty or staff member." *See* Pl.Ex. 12 (Cantrell Dep.), Dep. Ex. 4. Similarly, the Director of the University's Office of Information Technology ("OIT") granted employees in that department advance permission to access "sexually explicit materials if those acts are connected with or necessary to an OIT/ITC employee's official duties." Pl.Ex. 8 (McClure Dep.), Dep. Ex. 14. McClure testified that she felt compelled to grant a blanket approval "[b]ecause I wouldn't do anything but approve exceptions if they were on a case by case basis."

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[7] These are Radford University, the University of Virginia, and the College of William and Mary. *See* Plaintiff's S.U.F. ¶ 145. Only at Radford University and the College of William and Mary were these requests made by professors. *See Id.* ¶155 (Radford English professor requested access in order to write book on censorship); ¶156-60 (William and Mary English professor requested access relating to 18th Century studies, Sociology professor requested access for studies of deviant behavior and social control, Machine Shop Supervisor requested access for study concerning personal medical problems).

Pl.Ex. 8 (McClure Dep.) at 61 11. 1-2. We find it significant that in these cases of blanket approval, the agencies have used a broader standard than the Act's in that they allow access where the materials are either work related or work required. This is strong evidence that for academic institutions, at least, the Act's limitation to "required" is too narrow. Taken as a whole, these examples suggest either that the Act as written is unworkable, is largely being ignored by state institutions as superfluous and burdensome, or that it may be deterring speech by state employees. Any such inference bodes ill for the Act's validity. Indeed, the blanket approvals indicate attempts to refocus decisions concerning access to sexually explicit material to whether material is work related -- a standard not permitted under the Act.

The Court of Appeals for the District of Columbia considered a similar prior approval provision which allowed the government to approve otherwise restricted speech if it found such speech to be "within the mission of the agency." *See Sanjour*, 56 F.3d at 97. The court stated: "Far from being the saving grace of this regulatory scheme -- as the government suggests -- the broad discretion that the regulations vest in the agency reinforces our belief that they are impermissible." *Id.* The court concluded that the approval provision "justified an additional thumb on the employees' side of [the] scales" in any balancing against governmental interests. *Id.* We find the same to be true here, and conclude that the prior approval provision weighs heavily against the Commonwealth in the *Pickering/NTEU* balancing test.

The Existence of Content-Neutral Alternatives

Finally, state employees are already subject to content-neutral policies and statutes that address the legitimate concerns which the Commonwealth is trying to address with the

Act. For example, the Commonwealth's Policies and Procedures Manual prohibits state employees from making "unauthorized use" of state equipment, and was recently amended to prohibit the "[i]nappropriate or unauthorized" use of state computers and the Internet. *See* Commw. of Va. Dept. of Personnel and Training, *Policies and Procedures Manual* at 5 (Pl.Ex. 18); Memo from Charles E. James, Sr., Director of the Dept. of Personnel and Training, to Agency Heads and Human Resources Directors (Nov. 12, 1996)(Pl.Ex. 19). State agencies, colleges and universities have similar content-neutral standards in place designed to limit computer use to legitimate research purposes. *See* Plaintiffs' S.U.F. ¶ 136-37. Virginia Commonwealth University allows computer use "solely for the purposes of conducting university business." *See* Pl.Ex. 17, at 1. The University of Virginia prohibits computer use "unrelated to the University's mission," and Longwood College allows computer use "solely to support the mission of the College and its related academic, administrative and service activities." See Pl.Ex. 32 at 1; Pl.Ex. 31 at 1. Indeed, two of the incidents defendant complains of predate the Act and appear to have been resolved under the content-neutral policies existing at that time. As shown in defendant's exhibit 4, for example, an employee's conduct was reported to the Government Fraud, Waste and Abuse Hotline.

Likewise, content-neutral federal laws and regulations exist to deter the creation of a sexually hostile work environment. *See e.g.*, 42 U.S.C. §2000e-2(a)(1); 29 C.F.R. §1604.11(a); *see also Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). These authorities already provide civil penalties for acts of sexual harassment, and cut across media to include print displays of sexually hostile material. In addition, state obscenity laws provide criminal penalties for the most extreme workplace displays of sexual material. *See* Va.Code

Ann. §18.2-372 *et seq*. When reviewed against the provisions above, it is clear that the Act presents no improvement over existing federal law and state laws and policies concerning computer use and the Internet.

Given the over- and underinclusiveness of the Act and the existence of content-neutral alternatives, this Court concludes that the Act does not constitute a "reasonable response" to the Commonwealth's legitimate interests under the *Pickering/NTEU* standard. Although workplace efficiency and the avoidance of hostile work environment claims are undoubtedly important governmental interests, the Act fails to advance these interests in a direct and material way. Moreover, the Act restricts speech far beyond what is necessary to advance the interests it purports to address. Most troubling of all, the Act's poor fit and the availability of content-neutral alternatives suggest that the Act was intended to discourage discourse on sexual topics, "not because it hampers public functions but simply because [the state] disagree[s] with the content of employees' speech." *Rankin*, 483 U.S. at 384. The Supreme Court has made it clear that the government may not use its authority over public employees for such a purpose. *See id.* at 383-84. As such, we cannot find that the Commonwealth's justifications for the Act outweigh the interests of thousands of state employees and the public in expression on sexually explicit topics. *See NTEU*, 513 U.S. at 468. This Court therefore concludes that the Commonwealth has failed to satisfy the heavy burden required of it under the *Pickering/NTEU* balancing test.[8] Given this conclusion, the Court finds that the

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[8] As an alternative justification for the Act, the Commonwealth argues that the Act is needed to deal with the secondary effects associated with sexually explicit speech in the workplace. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Under this doctrine, restrictions on sexual speech have sometimes been allowed where the law at issue was

(continued...)

Act violates the First and Fourteenth Amendments of the United States Constitution and, therefore, must be invalidated. An appropriate order will be entered.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the plaintiffs' Motion for Summary Judgment is GRANTED and the defendant's Motion for Summary Judgment is DENIED, and it is hereby DECLARED that Va. Code §§2.1-804, *et seq.*, entitled "Restrictions on State Employees Access to Information Infrastructure" violates the First and Fourteenth Amendments of the United States Constitution and is, therefore, invalid.

Because they are the prevailing parties, plaintiffs are entitled to recover their reasonable attorneys' fees and costs pursuant to 42 U.S.C. §1988. Plaintiffs should submit their fee petition within eleven (11) days.

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[8] (...continued)
aimed not at content but at secondary effects associated with such speech, for example crime or eroding property values. *See id.* Here, the secondary effects claimed by the government are the offense, upset, and falling morale of employees involuntarily exposed to sexually explicit materials in the workplace. The Supreme Court has expressly placed such harms outside the scope of the secondary effects doctrine, stating that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in Renton" and that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" *See R.A.V.*, 505 U.S. at 394 (quoting *Boos v. Barry*, 485 U.S. 312, 321, 334 (1988)). Accordingly, we conclude that defendant's secondary effects argument does not merit serious consideration here.

CODE OF VIRGINIA

TITLE 2.1. ADMINISTRATION OF THE GOVERNMENT GENERALLY.

CHAPTER 52. RESTRICTIONS ON STATE EMPLOYEE ACCESS TO INFORMATION INFRASTRUCTURE.

§2.1-804 Definitions.

For the purpose of this chapter:

"Agency" means any agency, authority, board, department, division, commission, institution, institution of higher education, bureau, or like governmental entity of the Commonwealth, except the Department of State Police.

"Information infrastructure" means telecommunications, cable, and computer networks and includes the Internet, the World Wide Web, Usenet, bulletin board systems, on-line systems, and telephone networks.

"Sexually explicit content" means content having as a dominant theme (i) any lascivious description of or (ii) any lascivious picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in §18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in §18.2-390, coprophilia, urophilia, or fetishism.

§2.1-805 Restriction on agency employee access via computers to materials with sexually explicit content.

Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to ac-

cess, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (§§2.1- 340 et seq.) of Title 2.1.

§2.1-806. Agencies to inform enployees of chapter's provisions.

All agencies shall immediately furnish their current employees copies of this chapter's provisions, and shall furnish all new employees copies of this chapter concurrent with authorizing them to use agency computers.

CODE OF VIRGINIA

TITLE 18.2. CRIMES AND OFFENSES GENERALLY.

CHAPTER 8. CRIMES INVOLVING MORALS AND DECENCY.

ARTICLE 6. PROHIBITED SALES AND LOANS TO JUVENILES.

§18.2-390 Definitions.

As used in this article:

. . . .

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

. . . .

(2)

No. 00-466

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MELVIN I. UROFSKY, PAUL SMITH, BRIAN J. DELANEY, DANA HELLER, BERNARD H. LEVIN, and TERRY L. MEYERS,
Petitioners,

v.

JAMES S. GILMORE III,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the American Association of University Professors and The Thomas Jefferson Center for the Protection of Free Expression with the consent of both parties.[1]

STATEMENT OF INTEREST

The American Association of University Professors ("AAUP") is an organization of approximately 43,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. AAUP has frequently participated before this Court in cases raising First Amendment issues in higher education. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984). This Court has cited AAUP policies in its decisions. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972).

The Association's *1915 Declaration of Principles*, issued by the AAUP in its founding year, is the seminal statement on academic freedom in America. AAUP, "General Report of the Committee on Academic Freedom and Academic Tenure

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

(1915)," *reprinted as* Appendix A, 53 LAW & CONTEMP. PROBS. 393 (1990) ("1915 Declaration"). The 1915 Declaration was issued in response to the widespread dismissal of faculty members by administrators and trustees who disagreed with the expression of professors, including professors teaching Darwinism and speaking out for free silver. Walter P. Metzger, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 145-47 (1955).

The 1915 Declaration provides for "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action." 1915 Declaration, *supra*, at 393. It states: "The responsibility of the university teacher is primarily to the public itself, and the judgment of his own profession. . . ." *Id.* at 397.

The joint *1940 Statement of Principles on Academic Freedom and Tenure*, which was authored by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), codified the 1915 Declaration and has been endorsed by 172 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS & REPORTS 3 (1995 ed.) ("1940 Statement"). The 1940 Statement provides: "Freedom in research is fundamental to the advancement of truth." *Id.* The rationale underlying the 1915 Declaration and reiterated in the 1940 Statement is echoed in the repeated holdings of this Court that academic freedom is a "special concern of the First Amendment": the advancement of truth, the need for scholarly independence, and the university as a "market place of ideas." *See Keyishian*, 385 U.S. at 603.[2]

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[2] David M. Rabban, *"Individual" & "Institutional" Academic Freedom*, 53 LAW & CONTEMP. PROBS. 227, 240-41 (1990) (noting that

The Thomas Jefferson Center for the Protection of Free Expression ("The Thomas Jefferson Center") is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. Since its opening in 1990, the Center has pursued its mission in various forms, including the filing of *amicus curiae* briefs in both state and federal courts. A number of these cases have involved questions of academic freedom and free speech within the academic community. The Center has also filed briefs in cases involving the First Amendment rights of public employees and of Internet users.

Virginia Code § 2.1-804 impairs the academic freedom of professors by limiting their legitimate pedagogical and research use of the Internet in the pursuit of truth and knowledge. Petitioners' Appendix 112a-114a ("Pet.App.").

SUMMARY OF ARGUMENT

The Fourth Circuit majority decision conflicts with the repeated holdings of this Court that academic freedom is a First Amendment right of professors. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian*, 385 U.S. 589 (1967). No other court of appeals has denied the existence of that individual academic freedom. In this case, the Fourth Circuit majority, unlike any other courts of appeals, also significantly misconstrues this Court's test on "matters of public concern" by asserting that the work-related speech of state employees, including professors, may never constitute a matter of public concern. *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Lastly, the Fourth Circuit majority contravenes this Court's controlling First Amend-

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the judicial opinions and "the 1915 Declaration . . . used similar metaphors," such as that "[t]he description of the university in the 1915 Declaration as an 'intellectual experiment station' closely resembles the description of the classroom in *Keyishian* as a 'marketplace of ideas.'").

ment rulings by upholding a Virginia law that discriminates based on sexually explicit content and imposes an impermissible prior restraint. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, __ U.S. __, 120 S.Ct. 1878 (1999); *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750 (1988).

ARGUMENT

I. THE FOURTH CIRCUIT MAJORITY CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' CONSISTENT RECOGNITION OF ACADEMIC FREEDOM AS AN INDIVIDUAL RIGHT OF PROFESSORS.

This Court's precedents, which at least five federal courts of appeals have expressly followed, recognize that the First Amendment protects the academic freedom of state-employed professors. By asserting that academic freedom "inheres in the University, not in individual professors," Pet.App.15a, the Fourth Circuit majority dramatically departs from the established meaning of academic freedom under the First Amendment.

A. The Fourth Circuit Majority Repudiates This Court's Clear Recognition That the Academic Freedom of Professors Is a "Special Concern of the First Amendment."

This Court has consistently recognized that the First Amendment protects the academic freedom of professors. *Sweezy*, 354 U.S. 234; *Keyishian*, 385 U.S. 589. The Court has extended these holdings to institutions. *See Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985). Recognition of institutional academic freedom, however, "does not support the additional conclusion that the Court has rejected a constitutional right of individual professors to academic freedom . . . ." Rabban, *supra*, 53 LAW & CONTEMP.

PROBS at 280.[3] The Fourth Circuit majority's holding that only institutions have academic freedom contravenes this Court's individual First Amendment academic freedom rulings.

In *Sweezy*, 354 U.S. 234, the majority of this Court recognized a First Amendment right of academic freedom for university scholars. Sweezy was a lecturer at the University of New Hampshire who resisted state investigation into the content of his lectures. *Id.* at 236-38. The Court ruled that the government's inquiry into the subject matter of his lectures "unquestionably was an invasion of petitioner's [the lecturer's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Id.* at 250. The Court in *Sweezy* emphasized the First Amendment values at stake in the state's investigation: "Scholarship cannot flourish in an atmosphere

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[3] Assertions of academic freedom under the First Amendment tend to arise in one of the following three ways: "claims of professors against faculty colleagues, administrators, or trustees; claims of professors against the State; and claims of universities against the State." *Id.* at 231. Occasionally, these claims may conflict. As the authors of a higher education treatise explain:

> Constitutional principles of academic freedom have developed in two stages, each occupying a distinct time period and including distinct types of cases. The earlier cases of the 1950s and 1960s focused on faculty and institutional freedom from external (political) intrusion. These cases pitted the faculty and institution against the State. Since the early 1970s, however, academic freedom cases have focused primarily on faculty freedom from institutional intrusion. In these latter cases, faculty academic freedom has collided with institutional academic freedom.

William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 301 (1995 ed.). The present case harkens back to the earlier era: Virginia Code § 2.1-804 represents external interference by the state in the academic freedom of college and university faculty.

of suspicion and distrust. *Teachers* and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.* (emphasis added). The Court recognized the danger of infringing upon "such highly sensitive areas as freedom of speech . . . and freedom of communication of ideas, particularly in the academic community." *Id.* at 245.

A decade later, this Court struck down disclaimer and anti-subversion requirements placed on professors employed by the State University of New York. *Keyishian*, 385 U.S. 589. The Court warned that the "chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform *teachers* what is being proscribed," and recognized academic freedom as a "transcendent value to all of us *and not merely to the teachers concerned.*" *Id.* at 603-04 (emphasis added). The Court found academic freedom to be "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603 (citations omitted).

Since *Sweezy* and *Keyishian*, this Court has consistently embraced the First Amendment right of individual academic freedom.[4] This academic freedom can be limited only when the State has clearly established a compelling and narrowly drawn interest.[5] *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring); *Keyishian*, 385 U.S. at 604-05.

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[4] *See, e.g., Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967) ("We are in the First Amendment field. The continuing surveillance which this type of law places on *teachers* is hostile to academic freedom." (emphasis added)).

[5] The First Amendment protection of academic freedom is not absolute:

To reach its unsupported assertion that academic freedom applies only to administrative decisionmaking, the Fourth Circuit majority not only significantly distorts *Sweezy* and *Keyishian*, but also ignores *Ewing*, 474 U.S. 214. In *Ewing*, this Court observed: "Academic freedom thrives *not only* on the independent and uninhibited exchange of ideas among *teachers* and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Id.* at 226 n.12 (emphasis added) (citations omitted).[6]

Courts of appeals have also recognized that institutional academic freedom supplements, but does not supplant, the First Amendment academic freedom of professors.[7]

> There is, of course, nothing . . . that assumes that the First Amendment subset of academic freedom is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else. Thus, the false shouting of fire in a crowded theater may not immunize a professor of psychology from having to answer for the consequences of the ensuing panic, even assuming that he did it in order to observe crowd reaction first-hand and solely to advance the general enlightenment we may otherwise possess of how people act under great and sudden stress.

William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59, 78 (Edmond L. Pincoffs ed., 1972).

[6] This Court has recognized the concept of institutional academic freedom in other cases as well. *See, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring) ("The [academic] freedom of a university to make its own judgments as to education includes the selection of its student body.").

[7] *See, e.g., Piarowski v. Illinois Comm. College*, 759 F.2d 625, 629 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985) (noting that academic freedom "is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy"); *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir.) ("Academic freedom thrives not only on the robust and uninhibited exchange of ideas

B. The Fourth Circuit Majority Decision Clearly Conflicts with At Least Five Other Courts of Appeals' Decisions That Recognize an Individual Professor's First Amendment Right of Academic Freedom.

By limiting First Amendment academic freedom to institutions, the Fourth Circuit majority decision clearly conflicts with at least five other courts of appeals that have recognized professors' First Amendment right of academic freedom.

The Second, Sixth, and Ninth Circuits have applied the First Amendment right of academic freedom to protect professors' work in the classroom. The Second Circuit recognized as constitutionally protected a professor's academic freedom "based on [his] discussion of controversial topics in his classroom." *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 597-98 (2d Cir. 1990). In *Parate*, 868 F.2d at 829, the Sixth Circuit found that a university violated a professor's "First Amendment right to academic freedom" when it ordered the professor to change a student's original grade. Similarly, the Ninth Circuit ruled that a professor's academic freedom was violated by the application of a college's vague sexual harassment policy to classroom speech. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971-72 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997).

The Seventh Circuit held that a professor's First Amendment right of academic freedom extends to research as well as teaching. Observing that "whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom," the court refused to issue a subpoena for materials based on

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between the individual professor and his students, but also on the 'autonomous decisionmaking [of] . . . the academy itself.'" (quoting *Ewing*)), *reh'g denied*, 1989 U.S. App. LEXIS 5203 (6th Cir. Mar. 16, 1989).

toxicity studies in a university laboratory. *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982). The Seventh Circuit agreed with the position of the professors that individual scholarly research "lies at the heart of higher education" and therefore "comes within the First Amendment's protection of academic freedom." *Id.* at 1274.[8]

The Eighth Circuit has ruled that the First Amendment also protects professors as scholars. In *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (*en banc*), the court ruled that a university violated the academic freedom of two history professors by removing from the history department display case photographs in which the professors were attempting "to convey and advocate their scholarly and professorial interests in military history and in military weaponry's part in their vocation." *Id.* at 674. The court noted that "professors' academic freedom" was "a 'special concern of the First Amendment.'" *Id.* at 680 n.19 (citations omitted).

The Fourth Circuit majority decision is a singular departure from the courts of appeals' recognition that constitutional academic freedom protects professors' work.

II. THE FOURTH CIRCUIT MAJORITY OPINION SIGNIFICANTLY MISCONSTRUES THIS COURT'S TEST ON "MATTERS OF PUBLIC CONCERN," AND ITS DECISION CLEARLY CONFLICTS WITH AT LEAST FIVE COURTS OF APPEALS THAT RECOGNIZE THE PUBLIC INTEREST OF EMPLOYEE SPEECH.

The Fourth Circuit majority proclaims in this case that research and writing by university professors on sexual themes fail to involve matters of public concern and, therefore, are undeserving of First Amendment protection.

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[8] *See also Piarowski*, 759 F.2d at 629 (recognizing individual academic freedom).

Pet.App.12a-13a. The majority significantly misconstrues this Court's analysis in determining matters of public concern. *See Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138. No requirement exists under the *Connick-Pickering* test that speech related to professional concerns can never be a matter of public concern. Furthermore, professors are a different kind of state employee; they are not "state mouthpieces" of their institutions, Pet.App.53a (Wilkinson, C.J., concurring), but rather scholars hired to pursue their own research and ideas. The work-related speech by professors, including writing and research on sexual themes, is often a matter of public concern.

A. The Fourth Circuit Majority in This Case Significantly Misconstrues the *Connick-Pickering* Test.

Employment-related speech by public employees, including professors, does not remove such expression from the ambit of First Amendment protection. This Court in *Connick* ruled that not all speech by public employees relates to matters of public concern; it did not rule as unprotected by the First Amendment the entire category of employment-related speech by public employees. 461 U.S. at 142-43.

In *Connick*, the Court examined an employee questionnaire to determine whether the employee speech involved a matter of public concern or one of private interest. The Court defined a matter of public concern—including that expressed by an employee—as speech "relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. 146. It further explained: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. On balance, the Court found the employee survey in *Connick* to be speech by an employee addressing a matter of private interest because it was related primarily to a personal

grievance about a job transfer. At the same time, the Court found one survey question by the state employee—on whether employees felt pressured to work on political campaigns—to be of public concern. *Id.* at 149.

In this case the Fourth Circuit majority dramatically misreads *Connick* by ruling that speech related to employment cannot be a matter of public concern. The majority also reaches the unsupported conclusion that the Commonwealth may restrict public employee speech, including that of professors, because that speech is "purchased" by the state through the payment of salaries.[9] In so doing, the Fourth Circuit majority clearly ignores this Court's reasons for protecting socially important speech in the first place: to promote "unhindered debate on matters of public importance." *Pickering*, 391 U.S. at 573.

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[9] The Fourth Circuit majority's reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991), is misplaced. The majority opines that "restrictions on speech by public employees in their capacity as employees are analogous to restrictions on government-funded speech." Pet.App.10a & n.6. It asserts that "the government is entitled to control the content of the speech because it has, in a meaningful sense, 'purchased' the speech at issue through a grant of funding or payment of a salary . . ." *Id.* (citation omitted). *Rust* involved a challenge to government regulations, under which the government refused to fund certain activities, including speech.

Academic freedom and the Fourth Circuit majority's notion of "purchased speech" are mutually exclusive. Chief Justice Rehnquist recognized in *Rust* that a different analysis would be necessary in the academic context, as in this case:

> [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

Id. at 200 (citations omitted).

This Court has recognized, moreover, that exploration of sensitive and controversial subjects, including sex, may constitute a matter of public concern.[10] As Judge Murnaghan noted in his Fourth Circuit dissent,

> [Under] [t]he Commonwealth's recent revision to the Act limiting the definition of "sexually explicit content" to materials and descriptions that are "lascivious" . . . [m]any works of public import could be classified as lascivious; in fact, many were specifically intended to have such an effect. For instance, the works of Toni Morrison and many themes found in Victorian poetry, including the material researched online by one of the plaintiffs, Professor Meyers, could be classified as lascivious.

Pet.App.72a (Murnaghan, J., dissenting). State-employed professors are "hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern." Pet.App.52a. (Wilkinson, C.J., concurring).[11]

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[10] "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and *public concern.*" *Roth v. United States*, 354 U.S. 476, 487, *reh'g denied*, 355 U.S. 852 (1957) (emphasis added). In distinguishing between "sex" and "obscenity," this Court noted: "[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.*; *see also Reno v. ACLU*, 521 U.S. 844, 877 (1997) ("The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value."). The Virginia statute at issue here covers more than obscene speech.

[11] "A faculty . . . is employed professionally to test and propose revisions in the prevailing wisdom, not to inculcate the prevailing wisdom in others, store it as monks might do, or rewrite it in elegant detail. Its

State-employed university scholars are expected to pursue their own research and express their own views in the classroom and through publications, conferences, and research.[12] As part of their job responsibilities, professors conduct research, write, teach, publish, and debate with colleagues and students.[13] Much of the speech of state-

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function is primarily one of critical review: to check conventional truth, to reexamine ('re-search') what may currently be thought sound but may be more or less unsound." William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 87 (1990).

[12] *See Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1187-89 (6th Cir. 1995) ("The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character . . . The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives.").

[13] In this way professors are different from other state employees. As Chief Judge Wilkinson observed: "[S]tate university professors work in the context of considerable academic independence. The statute limits professors' ability to use the Internet to research and to write. But in their research and writing university professors are not state mouthpieces—they speak mainly for themselves." Pet.App.52a-53a (Wilkinson, C.J., concurring); *see also* Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *supra*, at 71 ("Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar: an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity.").

The academic freedom of professors promotes the public interest of society at large. *See* Rabban, *supra*, 53 LAW & CONTEMP. PROBS at 230 ("Asserting constitutional protection for professors and universities is not simply a form of special pleading to elevate the job-related concerns of a particular profession or the institutional interests of a particular

employed professors is likely to be matters of public concern, such as when a biologist writes a paper on the transmission of AIDS, or an English professor laments the declining attention to the traditional canon. In the end, "[i]t makes no sense to expect professors to engage in critical inquiry and simultaneously to allow punishment for its exercise." Rabban, *supra*, 53 LAW & CONTEMP. PROBS. at 242.

The professors' calling is to contribute to the robust exchange in the marketplace of ideas, which is part of "a tradition of thought and experiment that is at the center of our intellectual and philosophic tradition," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995), not to serve as "state mouthpieces," Pet.App.53a (Wilkinson, C.J., concurring).

B. The Fourth Circuit Majority's *Connick-Pickering* Analysis in This Case Clearly Conflicts with At Least Five Courts of Appeals.

The Fourth Circuit majority decision in this case conflicts with other circuits when it rules that employment-related speech by public employees, including professors, cannot be a matter of public concern.

Five courts of appeals have found that the work-related expression of public employees can be matters of public concern protected by the First Amendment. For example, the Seventh Circuit stated, "[W]e commonly have found speech by public employees spoken pursuant to their employment duties to constitute speech on a public concern." *Bonds v. Milwaukee County*, 207 F.3d 969, 980 (7th Cir. 2000). Other circuits have also expressly followed this Court's *Connick-Pickering* analysis, including: the Second Circuit, *see*

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enterprise. Rather, constitutional academic freedom promotes first amendment values of general concern to all citizens in a democracy.").

Harman v. City of New York, 140 F.3d 111 (2d Cir. 1988) (protecting social workers' answers to job-related inquiries from the media as matter of public concern); the Sixth Circuit, *see Dambrot*, 55 F.3d at 1185 ("[A] government employee [as an employee] retains [the] First Amendment right to comment on matters of public concern without fear of reprisal from the government as employer."); the Ninth Circuit, *see Nunez v. Davis*, 169 F.3d 1222, 1226-29 (9th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 932 (2000) (finding speech of employee, criticizing limiting seminar attendees to judge's reelection volunteers, matter of public interest); and the Tenth Circuit, *see Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988) (rejecting blanket rule that "communications made in the course of an employee's official duties" fall outside First Amendment).

Another Second Circuit opinion specifically acknowledges that state-employed professors, because of the nature of their work, often speak on matters of public concern. In *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994), the Second Circuit held as protected matters of public concern a law professor's discussion of the legalization of marijuana and criticism of national drug control policy in his classroom and writings. *Id.* at 1011-12. The court reasoned that "free and open debate on issues of public concern are essential to a law school's function" and that "the efficient provision of services by a State university's law school actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern." *Id.*[14]

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[14] *See also Scallet v. Rosenblum*, 911 F. Supp. 999, 1013 (W.D. Va. 1996) ("Scallet, as an educator, routinely and necessarily discusses issues of public concern when speaking as an employee. Indeed it is part of his educational mandate."), *aff'd on other grounds*, 106 F.3d 391 (4th Cir.), *cert. denied*, 521 U.S. 1105 (1997).

The Fourth Circuit majority's analysis of matters of public concern in this case clearly conflicts with other circuits.

III. THE FOURTH CIRCUIT MAJORITY'S APPROVAL OF THE VIRGINIA STATUTE'S LICENSING SCHEME CONTRAVENES THIS COURT'S FIRST AMENDMENT RULINGS BECAUSE THE LAW DISCRIMINATES BASED ON CONTENT AND CONSTITUTES A PRIOR RESTRAINT.

Virginia scholars who seek to pursue research that involves sexually explicit subjects must now seek permission, for which no criteria are provided, from an "agency head." Pet.App.113a. The Virginia statute impermissibly limits—based on the content of the speech—access to state-owned computers for research purposes. These restrictions also constitute a prior restraint.

A. The Fourth Circuit Majority Contravenes This Court's Rulings on Content Discrimination by Failing to Scrutinize Strictly Virginia's Statute.

The Fourth Circuit majority contravenes this Court's prohibition against content-based discrimination by failing to consider the impermissible content discrimination of Virginia's licensing scheme on state employees. Content-based restrictions are especially troubling when dealing with free expression and the Internet, as in this case: "Technology expands the capacity [for individuals] to choose [under the First Amendment]; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy,* 120 S.Ct. at 1889.

"Content-based burdens on speech raise . . . the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Therefore, a statute that regulates content "must be

narrowly tailored to promote a compelling Government interest." *Playboy*, 120 S.Ct. at 1886; *see also Burnham*, 119 F.3d at 674 (applying strict scrutiny to professors' expression). "[C]ontent-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and the government bears the burden of justifying its content-based restrictions, *Reno*, 521 U.S. at 879.

The Commonwealth failed to justify the licensing scheme of Virginia Code § 2.1-804, which constitutes a broad, content-based ban.[15] "The speech in question is defined by its content; and the statute which seeks to restrict it is content based." *Playboy*, 120 S.Ct. at 1885. If a statute prohibited the use of state-owned computers to access, for example, socialist materials, a court would immediately strike down the law as content-based, which is the case at hand.

The Fourth Circuit violates this Court's rulings because it fails to consider whether the Commonwealth had a narrowly drawn and compelling State interest to justify such a clear content-based restriction on the First Amendment academic freedom of professors.

B. The Fourth Circuit Majority's Approval of the Waiver Provision Conflicts with This Court's Rulings on Impermissible Prior Restraints.

The Commonwealth's licensing scheme is clearly an impermissible prior restraint on serious inquiry into sexual matters. The Act's approval process requires professors to

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[15] Chief Judge Wilkinson, although recognizing constitutionalized academic freedom of professors, neither considered the availability of content neutral rules to regulate state employee computer use under strict scrutiny analysis, nor applied the rigorous standard of scrutiny required under *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"). Accordingly, Chief Judge Wilkinson is mistaken that the Virginia statute protects institutional academic freedom. Pet.App.60a (Wilkinson, C.J., concurring).

seek permission to access sexually explicit materials "to the extent required in conjunction with a bona fide, *agency-approved* research project or other *agency-approved* undertaking." Pet.App.112a (emphasis added). As the Fourth Circuit dissent noted, "[t]he Act's prior approval process . . . has no check on the discretionary authority of State agencies," and "such grants of unbridled discretion to government agents invites arbitrary enforcement." Pet.App.77a (Murnaghan, J., dissenting).

In *City of Lakewood*, 486 U.S. at 750, 763-64 (1988), this Court ruled that

> [w]hen the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.[16]

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[16] *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."); *Sanjour v. EPA*, 56 F.3d 85, 97 (D.C. Cir. 1995) ("Far from being the saving grace of this regulatory scheme—as the government suggests—the broad discretion that the regulations vest in the agency reinforces our belief that they are impermissible."); *Harman*, 140 F.3d at 120 (striking down agency's policy requiring prior approval for employee statements to press, and noting that the potential for censorship by the government "justifies an additional thumb on the employees' side of [the] scales") (citations omitted); *see also* David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1418-19 (1988) (observing that a prior approval scheme for scholarly research "should strike virtually everyone as a violation of academic freedom," even absent "strong evidence of actual abuses").

A very exacting level of scrutiny is required where the government, as here, imposes a blanket prior restriction on the speech of professors and other State employees, thus creating a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," and "chill[ing] potential speech before it happens." *NTEU*, 513 U.S. at 467-68.[17] That is especially true of professors as public employees, because "public debate may gain much from their informed opinions" as employees. *See Waters v. Churchill*, 511 U.S. 661, 674 (1994).

The Fourth Circuit majority heralds the fact that no public employee has been denied permission to access sexually explicit materials. Pet.App.6a. However, the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757. And so, "[i]t is of no moment that the statute does not impose a complete prohibition." *Playboy*, 120 S.Ct. at 1886.

In the end, the Commonwealth has "strait jacket[ed]" state-employed professors by imposing this impermissible prior constraint. *See Sweezy*, 354 U.S. at 250.

CONCLUSION

For the reasons states above, *amici* respectfully urge that the petition for a writ of *certiorari* be granted.

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[17] *See also Sanjour*, 56 F.3d at 94; *Harman*, 140 F.3d at 118.

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No. 00-466

In The

Supreme Court of the United States

MELVIN I. UROFSKY, PAUL SMITH, BRIAN J. DELANEY, DANA HELLER, BERNARD H. LEVIN, and TERRY L. MEYERS,

Petitioners,

v.

JAMES S. GILMORE, III, GOVERNOR, Commonwealth of Virginia,

Respondent.

On A Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

BRIEF OF JAMES S. GILMORE, III, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, IN OPPOSITION

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QUESTIONS PRESENTED

Respondent takes issue with petitioners' statement of Questions Presented and re-states the question as follows:

> The Commonwealth of Virginia has instructed its employees not to use state computers to access or display lascivious, sexually explicit materials, except to the extent required in conjunction with a bona fide agency-approved research project or other agency-approved undertaking.
>
> 1. Do state employee petitioners have a First Amendment right to disregard these instructions on computer use and decide for themselves whether such materials are required for their professional, employment-related research and writing needs?
>
> 2. Do petitioners have standing to bring this issue before the Court?

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BRIEF OF JAMES S. GILMORE, III, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, IN OPPOSITION

Respondent James S. Gilmore, III, Governor of the Commonwealth of Virginia, respectfully submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves the constitutionality of a Virginia law regulating the use of state-supplied computers by state employees, Va. Code § 2.1-804 *et seq.* ("the Act"). The heart of the Act provides:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content.

Va. Code § 2.1-805.

The term "sexually explicit content" is narrowly defined to mean content in which certain "lascivious" descriptions or depictions are the "dominant theme." Va. Code § 2.1-804. This narrow definition was added to the statute *after* the decision by a three-judge panel of the court of appeals but *before* the case was argued *en banc*. 1999 Va. Acts, ch. 384. The amendment undermines the standing of petitioners who do not allege an interest in using lascivious materials. *See infra* at 5.

No penalties are provided for violating the Act. It is, instead, a legislatively adopted personnel rule, the enforcement of which is left to state agencies through the employee disciplinary and grievance procedures ordinarily in force. Similarly, the Act does nothing to disturb tenure protections at state universities.

The court of appeals took pains to note the Act's limited reach. "[S]tate employees remain free to access sexually explicit materials from their personal or other computers not owned or leased by the state." Pet. App. at 6a. The court of appeals also noted that state employees may still access sexually explicit materials using a state computer so long as "the agency head deems such access to be required in connection with a bona fide research project or other undertaking." *Id.* Although not addressed within the four corners of the Act, the record shows that agency heads may delegate responsibility for approving requests to administrators more closely connected to the work of employees making such requests. *See, e.g.*, Pet. at 5. "Virginia's colleges and universities have delegated primary approval authority to officials such as deans and department heads." Pet. App. at 60a.

Petitioners are a group of six state employees who challenged the Act on its face and as applied. They have renounced any claim to use state computers for "personal entertainment or enlightenment." Joint Appendix to the Circuit Court ("J.A.") at 56. Instead, they base their case "solely" on what they claim are "their professional, employment-related needs." *Id. See also* Brief of Appellees to the Circuit Court ("Br. of Appellees") at 25 (describing case as involving "professional, work-related communications"). Although petitioners are all professors at state

institutions of higher education, they did not originally base their claim principally on their status as academics. Instead, they relied on their more general status as employees of state government. Thus, in the decision of the district court, the term "academic freedom" does not appear.

In the court of appeals, petitioners changed direction and placed new emphasis on claims of academic freedom, arguing that the Act unconstitutionally interfered with both their research and teaching responsibilities. Br. of Appellees at 7. Coming before this Court, however, petitioners have abandoned their claim that the Act interferes with their *teaching* responsibilities. Their questions presented deal exclusively with "job-related research and writing" and they have expressly abandoned "any issue regarding control over curriculum content." Pet. at 12, n.8. Petitioners have also abandoned their claims of vagueness and overbreadth. Those issues do not appear in their questions presented. By so narrowing the case, petitioners have lost any standing they might otherwise have. *See infra* at 5.

Disdaining any supervision by their institutions, none of the petitioners has requested or been denied permission to access sexually explicit materials as provided by the Act. *Id.* Instead, petitioners attempt to characterize the approval process as unreasonable. They say that "[o]ne professor at the College of William and Mary received approval in connection with a scholarly journal . . . but other members of the staff and editorial board of the journal did not." Pet. at 5. What petitioners fail to disclose is that *no one else* from the journal *sought* approval. As the court of appeals noted, "no request for

access to sexually explicit materials on computers owned or leased by the state has been declined." Pet. App. at 6a. Indeed, the record contains various examples of professors' requesting and receiving approvals from their institutions to use state computers for sexually explicit materials. J.A. at 217-22, 287-89, 387-88 and 390. If any petitioners truly need lascivious, computerized materials for their job-related research and writing, they need only ask.

In support of their claim that the Act inhibits scholarly work and violates academic freedom, petitioners cite what they term the "Statement of Undisputed Facts, ¶¶ 32-98, Joint Appendix to Court of Appeals at 238-66. . . . " Pet. at 4-5. This is potentially misleading. The Commonwealth does not agree that the Act inhibits scholarly work or violates academic freedom. Moreover, the "Statement of Undisputed Facts" to which petitioners repeatedly refer is *not* a court-generated finding of fact, nor is it a document mutually agreed to by the parties. It is a statement crafted by petitioners *unilaterally* and included in the memorandum filed by them in support of their motion for summary judgment in the district court. Such a unilateral statement of allegedly undisputed facts is required by the rules of the district court. Rule 56(B), Rules of the U. S. District Court for the Eastern District of Virginia. It does not bind the Commonwealth or govern this case.

REASONS FOR DENYING THE WRIT

Summary

This case is not worthy of certiorari. It is beset by an array of standing problems that arise from a legislative narrowing of the Act and petitioners' abandonment of key issues. It fails to present any significant conflict. While the petition is replete with allegations of conflict, those allegations are based on an exaggerated view of the ruling below and on cases that are not pertinent to the questions presented by the petition. The case is further complicated by defenses advanced by the Commonwealth but which the Fourth Circuit majority never needed to reach. These defenses invoke forum analysis as well as the secondary effects doctrine. Additionally, as shown by the opinion of Chief Judge Wilkinson (concurring in the judgment), the Act passes muster under the *NTEU/Pickering* balancing test. These defenses further detract from the worthiness of this petition. Certiorari should be denied.

1. Petitioners No Longer Have Standing.

When this case began, petitioners argued that the Act's definition of sexually explicit content was so broad as to include not just *lascivious* material but also research and debate on non-lascivious sexual themes in art, literature, history, law, medicine and psychology. *See* Pet. App. at 94a. Some petitioners claimed that the Act interfered with their ability to use materials that were lascivious, while others said the Act interfered with their ability to use other materials that were sexually explicit in the broad sense, but that were not necessarily lascivious. The

Commonwealth disagreed with petitioners' broad interpretation and insisted that only lascivious materials were covered by the Act. A three-judge panel of the court of appeals agreed with petitioners. Pet. App. at 84a, n.6. In response, the 1999 General Assembly promptly amended the definition of "sexually explicit content" so as to include an express requirement that the dominant theme be lascivious. It was this amended law that was reviewed by the *en banc* decision of the court of appeals.

By amending the Act to add a requirement of lasciviousness, the General Assembly satisfied any concerns that might otherwise have been raised by petitioners desiring to use *non*-lascivious materials. They no longer have standing and their cases are now moot. Curiously, *none* of the petitioners has told this Court that the materials they seek to use meet the Act's requirement for lasciviousness. This alone is enough to raise serious questions about standing so as to make a grant of certiorari inappropriate.

When this case began, it also included the use of state computers for *all* types of sexually explicit speech by state employees so long as the speech was part of "their professional, employment-related needs." J.A. at 56. Now, however, they have expressly disclaimed any issues related to control of curriculum. Pet. at 12, n.8. Issues of vagueness and overbreadth are also wholly absent from their questions presented. They now limit their questions presented to "job-related research and writing." Thus, they have mooted out the cases of various petitioners, including those most arguably involved with lascivious material. For example, the lead petitioner, Melvin I. Urofsky, rests his claim of standing on the allegation that

"he had been unable to assign students online research assignments regarding federal indecency law because of the Act." Pet. at 4. Teaching assignments are part of the curriculum. Since control over curriculum is no longer in dispute, the effect of the Act on Professor Urofsky's teaching assignments is no longer an issue.

Similarly, petitioners have mooted out the case of Paul Smith. His claim of standing rested on a decision by university administrators to delete from their university's website clearly pornographic images that Smith had posted there. Pet. at 4.[1] Since none of the photographs was accompanied by any explanatory text, they do not fall within the category of research and writing. Thus, Professor Smith's right to display those pornographic images on his university's website is outside the scope of the questions presented.

Another petitioner, Terry L. Meyers, suggests that the Act compromises his ability to conduct research on "material supplied by the Commonwealth for the use of its scholars on its own Virtual Library of Virginia ('VIVA')

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[1] The Smith photographs included the following: (i) a naked man in bondage, J.A. at 170; (ii) the bare buttocks of a woman whose hands are chained and locked behind her, J.A. at 178; (iii) a naked woman hanging spread-eagle in bondage, J.A. at 179; (iv) a naked man stroking his erect penis, J.A. at 181; (v) a woman exposing her pierced and gaping rectum and vagina, J.A. at 182; and (vi) a woman anally penetrating a man using a strap-on dildo, J.A. at 183. Another photograph, not reproduced in the record, showed former child pornography star, Traci Lords, engaged in sexual intercourse. Petitioners' statement that the images were posted on *Smith's* website is misleading. All photographs bore the electronic address of George Mason University, http://mason.gmu.edu.

database." Pet. at 4. Assuming *arguendo* that the Victorian poetry that interests him is predominantly lascivious, he still has no standing. The statutory scheme contains an exemption for materials in VIVA. *See* Va. Code § 18.2-391.1.[2] While the court of appeals upheld the Act without discussing the limitations found in § 18.2-391.1, any assessment of petitioners' standing must include an evaluation of those limitations.

Finally, there is yet another problem with petitioners' standing. When this case began, they raised a *facial* challenge to the Act, and, in so doing arguably made relevant the constitutionality of the Act in all of its possible applications. Now, given the narrowness of their questions presented, the facial challenge has been abandoned. Instead, the Act is only challenged as it applies to the "job-related research and writing" of state employees. Yet even if one or more petitioners still had standing to

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[2] VIVA is an on-line library supported by a consortium of academic libraries in Virginia. *See, e.g.*, 1996 Va. Acts, ch. 1056, item 183(G). The Act defines "lewd exhibition of nudity," "sexual conduct," "sexual excitement" and "sadomasochistic abuse" by reference to Va. Code § 18.2-390, but the reach of that section is expressly limited by § 18.2-391.1: "Nothing contained in this article shall be construed to apply to: (1) The purchase, distribution, exhibition, or loan of any work of art, book, magazine, or other printed or manuscript material by any accredited museum, library, school or institution of higher learning." Thus, when Virginia's libraries and institutions of higher education – acting individually or collaboratively – place material "on-line," such electronic "distributions" and "exhibitions" are not covered by § 18.2-390, nor by the Act's incorporation of that section.

challenge the Act as applied to his or her own circumstances, none would have standing to challenge the Act as applied to anyone else. This means petitioners have no standing to challenge the Act as it applies to non-academic state employees. Indeed, since this is a not a class action, petitioners also lack standing to challenge the Act as it applies to other academics. Very little of the case is left and, as shown above, the lack of fit between the activities they allege and the questions they present deprive them of any standing whatsoever to challenge the Act as amended.

2. There Is No Conflict On Academic Freedom.

Petitioners' discussion of academic freedom exaggerates the issue in this case. They attribute to the Fourth Circuit the view that "state-employed professors have no first amendment-based right of academic freedom." Pet. at 11. The Fourth Circuit made no such sweeping pronouncement. Instead, the court focused on a much narrower subject: "The speech at issue here [is] access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties. . . . " Pet. App. at. 12a. Thus, the ruling below says nothing about the rights of professors to access materials using their own computers or for their own purposes. Moreover, "none of the [petitioners] have ever sought permission to access any materials on the Internet pursuant to the terms of the Act." *Id.* at n.7. Thus, the ruling below says nothing about the rights that a professor might be able to assert if a request contemplated by the Act were unreasonably denied by the institution. Finally,

the ruling below says nothing about what rights of academic freedom any professors may have as a result of their contracts with their institutions.[3] The issue in this case must be narrowed yet again by the limitations found in the questions presented by petitioners. Those questions deal exclusively with "job-related research and writing." None of their questions deals with classroom speech or curriculum, those issues having been expressly abandoned. Pet. App. at 12, n.8. In sum, the "academic freedom" issue in this case is very narrow and may be phrased as follows: *Do individual academic employees of the state have a First Amendment right to disdain supervision of their institutions and to decide unilaterally what materials and resources are required for their professional, employment-related research and writing needs?* Petitioners fail to show any conflict whatsoever on this question.

Petitioners cite several decisions by this Court extolling academic freedom; however, those decisions deal with issues far removed from the relatively mundane issue presented here and present no conflict. *See, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (discussing right of institution to decide who may be admitted); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (prohibiting university from discriminating against student publication based on its religious viewpoint); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)

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[3] *See, e.g.*, Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265 (1988) (arguing that definition and boundaries on constitutional academic freedom are significantly different from those concepts of academic freedom formulated by the academic profession itself).

(overturning contempt conviction of professor for refusing to answer questions about subversive activities); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (prohibiting state from disqualifying professor from employment based on refusal to take loyalty oath); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (allowing federal agency to subpoena tenure files of private university); *Board of Educ. v. Pico*, 457 U.S. 853 (curtailing authority of local school board to remove library books based on viewpoint); *Board of Regents v. Southworth*, 529 U.S. 217 (2000) (upholding viewpoint neutral mandatory student activity fee); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) (upholding authority of state university to dismiss student for academic deficiencies).

Their circuit cases dealing with academic freedom likewise present no conflict. Most of these cases involve disputes about classroom speech and curriculum, areas that are no longer at issue in this case.[4] Two of their circuit cases involved speech to the university community

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[4] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (speech at issue was racial epithet used by basketball coach during motivational speech to his players); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997) (professor disciplined under new, vague sexual harassment policy for longstanding – and previously accepted – teaching style); *Dube v. State Univ. of N.Y.*, 900 F.2d 587 (2nd Cir. 1990), *cert. denied*, 501 U.S. 1211 (1997) (speech at issue was discussion of controversial topic in classroom); *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989) (speech at issue was professor's assignment of grade to student); *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994) (professor allegedly disciplined for criticizing drug control laws in class and in campus publications).

through campus media, a category of speech that is also different from the speech at issue in the questions presented.[5] Only *one* of Petitioners' circuit cases deals with research and writing, *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982). Even *Dow* is inapposite because it involved a conflict between state university researchers and *private* parties who sought access to that research through a federal subpoena *duces tecum*. Moreover, in *Dow*, the state employer was aligned on the side of its researchers. Thus, the case says nothing about what research rights state-employed academics may have in opposition to their employer.

3. There Is No Conflict On Whether "Job-Related" Speech Can Be On "A Matter of Public Concern."

Petitioners contend that the decision below conflicts with decisions of this Court and other federal circuits on whether public employees have a First Amendment right in their "job-related research and writing." Pet. at 16. Their allegation of conflict is based on a semantic sleight of hand that switches back and forth between two fundamentally different meanings of the term "job-related." In the narrow sense, speech by an employee may be described as "job-related" only if it is made by the employee as part of the *performance* of his employment duties. The question is not whether the employee acts as a "government mouthpiece," but whether the speech is

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[5] *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (speech at issue was photography provided by professors for inclusion in student-organized exhibition appearing in university display case). *See also Blum, supra* at n.4.

part of the work the employee was hired to do. This Court has never suggested that government employees have a free speech right to be immune from supervision by their employers. (Were it otherwise, law clerks would not be accountable to the judges who hire them.) In a much broader sense, however, the term "job-related" may be used to refer to speech that is *not* part of an employee's work, but that is *about* his job or *about* his employer. Under this Court's precedents, such speech may or may not be constitutionally protected, depending on whether it is on a matter of public concern. *Connick v. Myers*, 401 U.S. 138 (1983).

In the case at bar, only the narrow type of "job-related" speech is at issue. That is to say, the only category of speech implicated by the decision below is speech made by state employees in the performance of their job duties. This is shown by petitioners' statement that they base their case "solely" on what they claim are "their professional, employment-related needs." J.A. at 56. It is also shown by the court of appeal's statement limiting "the speech at issue" to certain materials used for "carrying out employment duties." Pet. App. at 12a. Finally, it is shown by the examples of speech that petitioners allege are impinged by the Act. Pet. at 3-4. The various professorial tasks described by the petition are all part of the scholarly work petitioners are paid to do.

By contrast, petitioners attempt to show a conflict by citing decisions that involve the broader type of "job-related" speech. The four decisions they cite from this Court plainly fall into the second category. In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), a public school teacher was dismissed for publishing in a local newspaper a

letter criticizing how the school board had handled proposals to raise revenues. There is no suggestion that communicating with the news media was part of the teacher's job. He acted as a private citizen.

In *Connick v. Myers*, 461 U.S. 138 (1983), an assistant district attorney, unhappy with a change of duties, distributed a questionnaire to her co-workers inquiring about a range of subjects. *Id.* at 141. Some of her questions "pertain[ed] to the confidence and trust that [her] co-workers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee" and were merely extensions of her dispute over her own transfer. *Id.* at 148. Another question asked whether her co-workers ever felt "pressured to work in political campaigns on behalf of office supported candidates" and was clearly a matter of public concern. *Id.* at 149. While the Court treated these sets of questions differently, *none* of this speech was in the discharge of the duties the plaintiff had been hired to perform. Thus, *Connick* furnishes no precedent for restricting the ability of government to control the content of speech forming part of its employees' work.

In *Waters v. Churchill*, 511 U.S. 661 (1994), a public hospital fired a nurse who had allegedly criticized hospital policies while conversing on break with a co-worker. What the nurse actually said was disputed; however, no one alleged that her remarks were part of her job. The case is predominantly directed toward resolving what investigative standard should apply when the content of an employee's comments are in dispute. The Court concluded that even if one version of the conversation

warranted constitutional protection, "the potential disruptiveness of the speech *as reported* was enough to outweigh whatever First Amendment value it might have had." *Id.* at 680 (emphasis added). Thus, *Waters* is also inapposite.

United States v. National Treasury Employees Union ("*NTEU*"), 513 U.S. 454 (1995), involved an honoria ban that applied to writings and other expressive activities having no nexus to the employees' federal employment.[6] Justice Stevens, writing for the majority, took pains to emphasize the fact that such employees staked no constitutional claim involving their official duties.

> They seek compensation for expressive activities in their capacity as citizens, not as Government employees. . Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

Id. at 465.

This case is not controlled by *NTEU*. It is *NTEU's* antithesis. Here, petitioners assert *only* a right as government employees to use state computers to access sexually explicit materials and to do so unconditionally. The decisions by this Court do not recognize such a right.

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[6] A postal employee in *NTEU*, for instance, sought compensation for lectures he gave on the Quaker religion. An aerospace engineer had been compensated to lecture on black history. There was an FDA microbiologist who critiqued dance performances, a Nuclear Regulatory Commission lawyer who penned articles about Russian history and a tax examiner who wrote articles about the environment. *Id.* at 461-62.

Similarly, almost all of the circuit cases cited by the petitioners deal with the broader category of "job-related" speech. For example, in *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995), two employees of the Environmental Protection Agency wished to travel on their own time to give their own, unofficial views at a public hearing on a proposed hazardous waste incinerator. The private group that organized the hearing offered to reimburse them for their travel expenses. There was, however, a federal ethics regulation that prohibited federal employees from accepting reimbursement for expenses incurred in connection with *unofficial* speaking engagements *relating* to official duties. Without the reimbursement, the two employees were unable to attend. *Id.* at 89. The D.C. Circuit applied the *Pickering/NTEU* balancing test and decided that the regulation was invalid. Unlike that regulation, there is nothing in the Act that restricts what state employees may say or do *outside* the workplace, nor is there anything in the Act that restricts how they may use *their own* computers. *Sanjour* is irrelevant.

Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998), involved a social welfare agency where press policies forbade employees from having media contact without first obtaining their employer's consent. ABC News contacted Harman, an agency employee, about a child allegedly beaten to death by her mother. Harman agreed to speak with ABC and did so off agency premises during her lunch hour. ABC later broadcast footage of her statement criticizing the agency. When the agency suspended her, she sued, claiming the media policy was unconstitutional. Harman's remarks were *about* her employer; they were not in the *performance* of her job. Her duties did not

include serving as a media spokesman. Thus, there is no conflict between *Harman* and the decision below.

Bonds v. Milwaukee County, 207 F.3d 969 (7th Cir. 2000), involved a city-employed fiscal analyst who, while participating in a community forum, was openly critical of the city's proposals on certain block grant programs. Thereafter, because of what it viewed as Bonds' poor judgment, disloyalty, and lack of discretion, a neighboring county withdrew an offer of employment it had previously made to Bonds. Bonds then sued the county. Whether his remarks at the forum are viewed as part of his work for the city or as purely private speech, they were not in the performance of any work for the county. In any event, Bonds lost. The peculiar facts of the case are too far removed from the case at bar to create any meaningful conflict.

In *Latino Officers Ass'n v. City of New York*, 196 F.3d 458 (2nd Cir. 1999), the issue was whether an organization of Latino police officers in New York City could wear their uniforms while marching in various ethnic parades. The court ruled in favor of the officers, based on the police department practice of allowing a competing group of Hispanic officers to wear their uniforms in similar parades. Marching in parades was not, however, part of the job duties of these officers. It was purely private speech by which, the court said, they reminded their community of their longstanding allegations of police department discrimination and misconduct. *Id.* at 466.

Two cases from the Ninth Circuit, *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999), and *Chateaubriand v. Gaspard*, 97

F.3d 1218 (9th Cir. 1996), involved the firing of public employees who objected to instructions that they engage *in unconstitutional political reprisals or in otherwise* unlawful political activity. As such, they are best viewed as "whistle-blowing" cases that are so far afield from the case at bar as to make them of no use in establishing a conflict.

In *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), the plaintiff was a campus police officer discharged for making a sexual harassment complaint that her employer said contained misrepresentations. While the court concluded that the plaintiff spoke "both as a citizen and an employee," it also concluded that she did not speak in the performance of her duties as a police officer. *Id.* at 1270. Thus, there is no conflict between *Wilson* and the case at bar. Petitioners also cite *Wilson* for the proposition that "denying First Amendment protection simply because speech is job-related [in the narrow sense] 'would permit public employers to remove constitutional protection from speech on certain subjects by including those subjects within employees' reporting duties.' " Pet. at 18, quoting *Wilson*, 973 F.2d at 1269. The simple answer to this concern is that courts are likely to see through any such pretext. Moreover, to the extent that there may be a need for special constitutional protection for the "whistler-blower," it is a concern completely foreign to the case at bar.

In *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216 (5th Cir.), *cert. denied*, 120 S.Ct. 533 (1999), several teachers were reprimanded and transferred to another school as a result of their speech at a committee meeting in which

they complained about their school principal. The transfers were overturned by the court. What is significant about *Harris* is that the committee where the plaintiffs spoke had been empanelled by the Texas legislature for the express purpose of improving the quality of the public schools. The case is best read as standing for the proposition that a state cannot ambush public employees by inviting them to express their concerns and then punishing them if it decides their views are unpleasant. These facts have no similarity to the case at bar.

Only two of the circuit decisions cited by petitioners involved speech by a public employee in the performance of his job duties: *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) (*en banc*), *cert. denied*, 488 U.S. 909 (1988) (fire marshal demoted, in part, for his written report expressing views that showed lack of professional judgment) and *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (speech at issue was racial epithet used by basketball coach during motivational speech to his players). But, in neither of those two cases did the employee prevail. Thus, even if those decisions contain expansive language suggesting a different analytical approach than the one followed by the Fourth Circuit, they do not furnish the sort of mature conflict that would merit the attention of this Court. *See Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

4. There Is No Conflict Regarding "Prior Restraint."

Again, petitioners try to conjure up a conflict by disregarding the basic distinction between the job-

performance speech at issue here, and the purely private speech at issue in other cases. None of the cases they cite applies the prior restraint doctrine in the context of speech by employees in the performance of their employment duties.

The decisions from this Court on which petitioners rely are clearly inapposite. *See, e.g., Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (state commission acted unconstitutionally by intimidating distributors and retailers of privately published books it deemed objectionable); *Freedman v. Maryland*, 380 U.S. 51 (1965) (state motion picture censorship statute held unconstitutional in criminal prosecution against private exhibitor who showed film without license); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (ordinance requiring newspapers to obtain license before placing distribution racks on public property held unconstitutional); *NTEU* (law forbidding federal employees from receiving honoraria for speech held unconstitutional in context of speech having no nexus to employees' work) (*see supra* at 15); and *Playboy Entertainment Group v. U.S.*, 120 S.Ct. 1878 (2000) (federal statute requiring cable operators to scramble or block sexually oriented programs held unconstitutional). In short, petitioners have not cited *any* prior restraint decisions by this Court involving speech by public employees in the performance of their job duties.

The circuit court decisions cited by petitioners are likewise inapposite. *See Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (ban on federal employees' accepting privately-paid compensation for speaking on agency-related matters held unconstitutional when employees were

speaking in unofficial capacity) (*see supra* at 16); *Harman v. City of New York*, 140 F.3d 111 (2nd Cir. 1998) (media contact policy of city social services agency held unconstitutional in context of criticisms made to media by employee during lunch hour and outside official premises) (*see supra* at 16); *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (photographs contributed by professors to student-organized display held to be constitutionally protected using forum analysis); *Weaver v. United States Info. Agency*, 87 F.3d 1429 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) (requirement that employees in foreign policy agencies make pre-publication submission of materials on matters of official concern upheld as constitutional). In sum, there is no conflict.

Petitioners also argue that the scope of the term "lascivious" may be difficult to discern. Pet. at 22. But, even in the more stringent context of criminal law, this Court has already rejected as "insubstantial" the argument that the term "lascivious" is vague. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994). Moreover, the questions presented by petitioners do not raise a vagueness issue.

Finally, petitioners complain about the Act's requirement that agency approvals be subject to the Virginia Freedom of Information Act ("FOIA"). Pet. at 22-23. Yet, they disclaim any intent to find *constitutional* fault with that requirement. Pet. at 23, n. 17.[7] Moreover, the disclosure cases cited by petitioners involve purely private

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[7] Written approvals for employee work are public documents and, as such, are subject to the sunshine laws that apply generally to public documents in Virginia. *See* Va. Code § 2.1-340 *et seq.* The fact that the General Assembly took pains to

speech, not speech by public employees in the performance of their jobs. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (Ohio statute requiring candidates to disclose sources and expenditures of campaign funds was unconstitutional as applied to nominees of minor party historically subject to government and private harassment); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (Federal postal statute providing for destruction of foreign Communist propaganda, unless affirmatively requested by addressee, was held unconstitutional); *Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727 (1996) (Federal requirements of advance notice before transmitting cable programming containing patently offensive sex-related material were held unconstitutional.) Again, there is no conflict.

5. The Rationale Used By Chief Judge Wilkinson and Other Arguments Advanced by the Commonwealth Provide Alternative Bases For Upholding the Act.

The inappropriateness of certiorari is further illustrated by the alternative arguments advanced by the Commonwealth in support of the Act. Although not reached by the Fourth Circuit majority, these arguments remain valid defenses that petitioners would have to

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state expressly the applicability of FOIA is not a constitutional infirmity. On the contrary, the FOIA clause is a democratic, speech-enhancing part of the Act that furthers the interests of the public in knowing how their taxpayer resources are being used. *See Meese v. Keene*, 481 U.S. 465 (1987) (federal requirement that distributors of foreign propaganda be subjected to public disclosure advances First Amendment values and enhances public's right to know).

overcome in order to obtain a judgment that the Act is unconstitutional. For these reasons, too, the writ should be denied. These defenses may be summarized as follows:

Public Forum Analysis: The speech at issue here occurs on government property: state supplied computers. Thus, the constitutionality of any rules governing their use for private speech must be reviewed under forum analysis. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983) (recognizing three categories of property that may serve as forum: (i) traditional public forum, (ii) designated public forum and (iii) non-public forum). State computers are dedicated not to public debate but to the official work of government agencies. They are neither a traditional public forum nor a designated public forum. They are, at most, a non-public forum, "where the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner." *Paulson v. County of Nassau*, 925 F.2d 65, 69 (2nd Cir. 1991). "Control over access to a nonpublic forum can be based on *subject matter* and speaker identity so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint neutral*." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) (emphasis added).

The Act is viewpoint neutral. It restricts communications having "sexually explicit *content*." Va. Code § 2.1-805 (emphasis added). This restriction is a permissible subject matter regulation, especially since lasciviousness is not a viewpoint. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (rejecting claim that "offensively lewd and indecent speech" was related to

political viewpoint); *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) ("an unconstitutional motivation would not be demonstrated" if school board removed library books because they were "pervasively vulgar" rather than because of "disfavored ideas"). *See General Media Comm. v. Cohen*, 131 F.3d 273, 282 (2nd Cir. 1997), *cert. denied*, 524 U.S. 951 (1998) (rejecting as "linguistic overreaching" claim that "lasciviousness" is a viewpoint).

The Act is also reasonable. By prohibiting state employees from indiscriminately using state computers for lascivious sexually explicit materials, the Act furthers the Commonwealth's legitimate interest in guarding the productivity of its employees and avoiding a hostile work environment. Moreover, by vesting authority to grant exceptions with agency heads, the Act appropriately relies on the officials who are most directly responsible for the work of the agencies, and who can be expected to grant exceptions when required by such work. *See United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (presumption of regularity in decisions by government officials).

(b) The Secondary Effects Doctrine: The secondary effects doctrine has been used by the Court to uphold zoning laws that ban certain lascivious, sexually explicit speech from designated neighborhoods. The Act is analogous in that it also bans sexually explicit speech from designated venues: state computers. In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court found a zoning law constitutional because, despite its apparent content-based approach, "the City Council's '*predominate* concerns' were with the secondary effects of adult theaters,

and not with the content of adult films themselves." *Id.* at 47 (emphasis in original). The Court identified the secondary effects to include (i) crime, (ii) injury to retail trade, (iii) depression of property values, and (iv) general deterioration in neighborhood quality. *Id.* at 48. The vitality of this doctrine was recently reaffirmed in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

The secondary effects of sexually explicit materials on state computers are analogous to those identified in *Renton*. They include (i) infringement of the workers' right to be free from sexual harassment in the workplace, (ii) exposure of the state to legal liability for a sexually hostile environment, (iii) injury to productivity, and (iv) general deterioration of professionalism and workplace quality.

(c) NTEU/Pickering Balancing Test: Even if petitioners could show that the *NTEU/Pickering* balancing test is applicable, they would not prevail unless they could also show that the balance must be struck in their favor. This they cannot do, as shown by the opinion of Chief Judge Wilkinson, who concurred in the judgment of the Fourth Circuit. *See* Pet. App. at 47a-66a. Chief Judge Wilkinson used the *NTEU/Pickering* balancing test advocated by petitioners and found the Act passes muster. Key to his analysis were the following elements:

- "[T]he General Assembly addressed a real, not a fanciful problem when it enacted the statute. The record is replete with examples of Internet web sites displaying graphic forms of sexual behavior." Pet. App. at 58. *See also* n.2 *supra*.

- "The posting of such material on web sites in state offices has led to workplace disruption and complaints that such sexually graphic matter contributes to a hostile work environment." *Id.*

- "The state thus has every right to require its employees to spend their workday energies on the functions for which it is paying them." *Id.* at 59a.

- "The recent revisions to the statute . . . have narrowed its scope considerably [and] . . . it now restricts a more limited range of material – mainly that which has as its dominant theme the lascivious depiction of nudity or sexual conduct." *Id.* at 59a – 60a.

- "[T]hrough the waiver process the Commonwealth . . . accommodates the various interests at stake – barring employee access to lascivious material generally, but providing a procedure that can be invoked whenever educational institutions determine that academic freedom so requires." *Id.* at 60a.

- "The significant state interest here is thus balanced against a minimal intrusion on academic inquiry. Under the Act, the ultimate judgment on whether a requested waiver is for a bona fide research project resides in the system of university governance." *Id.*

- "The Commonwealth thus *maintains academic freedom* by reposing critical authority *within the university* itself." *Id.* (emphasis added).

The balancing test undertaken by Chief Judge Wilkinson is closely tied to the facts of this record and thus does not lend itself to allegations that there is a conflict

among the circuits. Indeed, petitioners allege no conflict insofar as the Wilkinson opinion is concerned, but limit themselves to a tepid protest of his judgment in weighing the competing considerations. Pet. at 24-25. Petitioners' disagreement about the outcome of the balancing test does not make this case worthy of certiorari.

In sum, the Commonwealth has an array of strong alternative defenses that complicates petitioners' efforts to invalidate the Act and that makes certiorari inappropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 00-466

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

MELVIN I. UROFSKY, PAUL SMITH, BRIAN J. DELANEY, DANA HELLER, BERNARD H. LEVIN, and TERRY L. MEYERS,

Petitioners,

—v.—

JAMES S. GILMORE, III,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Evidently recognizing that the Fourth Circuit's ruling clashes radically with this Court's academic freedom decisions as well as precedents in other circuits, the Commonwealth of Virginia has attempted a diversionary strategy by manufacturing a problem of standing. No standing problem exists, however; on the contrary, as the Commonwealth it-

self argued in the court of appeals, the statutory amendment adding the term "lascivious" to Virginia Code §2.1-804-806 had little effect on the case because the plaintiffs' claims encompass a right to access art, literature, and scientific works that could reasonably be deemed "lascivious." Thus, the question whether state-employed scholars have any right of academic freedom in connection with their job-related research and writing -- as well as the other three questions presented in the petition -- are ripe for resolution by this Court.

The record is replete with evidence that the plaintiffs and other university professors have legitimate work-related scholarly interests in online sexually explicit material in the arts, sciences, law, and literature, that could be considered "lascivious." All six plaintiffs filed declarations in support of their motion for summary judgment that detailed their research, writing, and communications with other scholars in areas ranging from indecency law to Victorian poetry, psychosexual dysfunction to gay and lesbian studies. See Statement of Undisputed Facts, ¶¶32-98, J.A. at 238-66; Declaration of Brian Delaney (listing literature relevant to his research and teaching by Walt Whitman, Audre Lorde, Toni Morrison, Anne Sexton, Vladimir Nabokov, Norman Mailer, and Philp Roth); Declaration of Dana Heller (describing works by Allen Ginsberg and Kathy Acker and films examined in connection with her research such as *Blue Velvet* and *Go Fish*, in addition to lesbian comic book, *Hothead Paisan*, articles about pornographic magazines such as *Hustler*, materials on safe sex, and work by a Russian artist that featured "a nude woman with large breasts and erect nipples devouring a sausage in a rather explicit way"); Declaration of Bernard Levin (describing topics in psychology such as "aspects of adult or adolescent sexuality, Freud's libido concept, Freud's oral, anal, and genital stages of development, or Freud's concept of penis envy" and psy-

chology Web sites containing material on fellatio, fetishism, and other paraphilias); Declaration of Terry Meyers (outlining themes of flagellation, necrophilia, and sado-masochism in Swinburne and other "fleshly school" poets, lascivious poetry by the Earl of Rochester, novels by D.H. Lawrence, and listserves on Victorian sexuality);[1] Declaration of Paul Smith (explaining contemporary academic field of cultural studies, including research on pornography and the politics of fantasy, commodification of women's bodies, and discourses about gender and sexuality);[2] Declaration of Melvin Urofsky (describing research into online indecency, including Web sites and chat rooms).[3]

All of the courts below credited this evidence, and the Commonwealth did not contest it. Indeed, the statutory amendment which the Commonwealth now claims deprives all six plaintiffs of standing was added before the *en banc* proceedings below, yet the court of appeals perceived no problem with standing, and the Commonwealth did not suggest one. Instead, it took the position that addition of the term "lascivious" simply clarified the original intention

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[1] Professor Meyers's work thus includes, but is not limited to, the VIVA databases made available by the Commonwealth.

[2] Professor Smith's research and writing in connection with lascivious sexually explicit content encompasses much more than a handful of images on his Web site. Moreover, the Commonwealth's notion that visual imagery unaccompanied by text cannot constitute research or publication is spurious. Web sites, in any event, inherently link images and text.

[3] Professor Urofsky's investigations into online indecency included but were not limited to gathering material for potential class assignments. The Commonwealth's effort to deprive him of standing because "control of curriculum" is not an issue in this case misapprehends the job of professors in *researching* materials that they may then incorporate into their teaching.

of the law, and that the parties "continue to have a stake in the litigation" because of the plaintiffs' consistent claim that their First Amendment-based academic freedom right "applies even when the materials are lascivious." Response of Appellant to Plaintiff-Appellees' Memorandum Concerning Mootness at 5-6.

As the plaintiffs stated in their brief to the court of appeals:

> Countless works of art, from the sensuous nudes of Titian, Goya, or Renoir to explicit depictions by Schiele or Courbet, can easily be seen as lascivious, and in many cases were meant to be. The same is true of literature, from Aristophanes' *Lysistrata* to works by Henry Miller, John Updike, Toni Morrison, or Erica Jong. Many would undoubtedly consider passages in works of politics or social science to be lascivious – for example, descriptions of prison rape (J.A. 275; exh. 11 to Wheeler Decl.), psychological abstracts on vibrator use (J.A. 274), or the *Final Report* of the 1986 Attorney General's Commission on Pornography, which contains detailed plot summaries of pornographic films. Scholars simply cannot be barred from studying all that might be "lascivious" in human culture, or required to obtain a license before doing so.

Brief of the Appellees, at 15-16.

The Commonwealth also asserts, without any basis in the record, the prior proceedings, or the petition for *certiorari*, that the petitioners have "abandoned" their facial challenge to the Act. All of the courts below treated the case as a facial as well as an as-applied challenge, and nothing in the petition for *certiorari* changes that posture.

Indeed, the questions presented, which flow directly from the Fourth Circuit *en banc* majority's sweeping denial of any First Amendment protection for any scholar or other public employee in connection with his or her work, are all framed in terms of the facial challenge.

The Commonwealth seems to believe that by not explicitly using the words "overbreadth" or "vagueness" in any of the four questions presented, petitioners abandoned not only these particular claims but also their facial challenge. Facial challenges are not limited, however, to specific claims of overbreadth or vagueness. Here, the statute is challenged on its face as a direct interference with the rights of scholars and other public employees engaged in intellectual work. Moreover, the Fourth Circuit's ruling was so sweeping that it automatically disposed of the First Amendment-based overbreadth and vagueness claims. If this Court reverses on the overarching constitutional issue, then it (or the courts below) could properly proceed to resolve not only the question of First Amendment balancing but the questions of vagueness and overbreadth.

CONCLUSION

For the foregoing reasons and for the reasons set for in the petition for a writ of *certiorari*, the writ should be granted.

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